TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908

No. 1847.

HANNAH FITCHIE, BARRY FITCHIE; HANNAH FITCHIE AND BARRY FITCHIE, EXECUTORS UNDER THE WILL OF ELIZA FITCHIE, DECEASED; ELIZA FRENCH, JOHN GALBRAITH, WILLIAM GALBRAITH, SAMUEL GALBRAITH, MARTHA CULLY, MARGARET JANE [illegible], AND HUGH GALBRAITH, APPELLANTS,

vs.

CECIL BROWN AND WILLIAM O. SMITH, EXECUTORS UNDER THE WILL OF GEORGE GALBRAITH, DECEASED, AND THE HAWAIIAN TRUST COMPANY, LTD.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED MARCH 26, 1907.

(20,627.)

(20,627.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 263.

HANNAH FITCHIE, BARRY FITCHIE; HANNAH FITCHIE AND BARRY FITCHIE, EXECUTORS UNDER THE WILL OF ELIZA FITCHIE, DECEASED; ELIZA FRENCH, JOHN GALBRAITH, WILLIAM GALBRAITH, SAMUEL GALBRAITH, MARTHA CULLY, MARGARET JANE ROME, AND HUGH GALBRAITH, APPELLANTS,

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CECIL BROWN AND WILLIAM O. SMITH, EXECUTORS UNDER THE WILL OF GEORGE GALBRAITH, DECEASED, AND THE HAWAIIAN TRUST COMPANY, LTD.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 23, 1907.

1 In the Supreme Court of the Territory of Hawaii.

Amendment by insertion of the name of "Hugh Galbraith" as a party plaintiff herein, made by leave of Court.
Oct. 9/06.
(Sgd.) J. A. T., *Clerk.*
($2. stamps.)

HANNAH FITCHIE, BARRY FITCHIE; HANNAH FITCHIE and BARRY FITCHIE, Executors under the Will of Eliza Fitchie, Deceased; ELIZA FRENCH, JOHN GALBRAITH, WILLIAM GALBRAITH, SAMUEL GALBRAITH, MARTHA CULLY, and MARGARET JANE ROME, and HUGH GALBRAITH,

v.

CECIL BROWN and W. O. SMITH, Executors under the Will of George Galbraith, Deceased, and HAWAIIAN TRUST COMPANY, LIMITED.

Submission on Agreed Statement of Facts.

To the Justices of the Supreme Court of the Territory of Hawaii:

The undersigned Hannah Fitchie, of Ballydrain, County of Down, Ireland, Barry Fitchie, of Belfast, Ireland, said Hannah Fitchie and Barry Fitchie, as Executors under the Will of Eliza Fitchie, deceased, Eliza French, of Belfast, Ireland, John Galbraith, of Wahiawa, Island of Oahu, Territory of Hawaii, William Galbraith, of Ringneal, County of Down, Ireland, Samuel Galbraith, of Durham City, County of Durham, England, Martha Cully, of No. 40 Browney Colliery, County of Durham, England, Margaret Jane Rome, of Durham City, County of Durham, England, Cecil Brown and W. O. Smith, Executors under the Will of George Galbraith, deceased, of Honolulu, Territory of Hawaii, and the Hawaiian Trust Company, Limited, a corporation organized and existing under the laws of the Territory of Hawaii, respectfully represent that they are parties to a question of difference which might be the subject of a civil action in the Circuit Court or Supreme Court of the Territory of Hawaii and that they have agreed upon a case containing the facts upon
2 which the controversy depends, and present herewith a submission of the same to the Justices of the Supreme Court of the Territory of Hawaii.

The facts upon which the controversy depends are as follows:

1. George Galbraith, a native of the County of Ireland, and for many years next preceding, and at the time of, his death domiciled in Honolulu, Territory of Hawaii, died on the 5th day of November, 1904, leaving a last Will and Testament and a codicil thereto, a copy of which said Will and codicil is hereunto attached, marked Exhibit "A" and made a part hereof.

2. That said Will and codicil thereto were duly admitted to probate on the 24th day of March, 1905, by the Honorable W. J. Robin-

son, Third Judge of the Circuit Court of the First Circuit, Territory of Hawaii, sitting at Chambers in Probate; that said Cecil Brown and W. O. Smith, named as executors in said Will, duly qualified as such executors and in the administration of said Estate have paid all the debts of the decedent as required by law and all of the legacies in said Will set forth except the residuary bequest therein set forth, and are now desirous of filing their final accounts and of distributing said residue of the Estate remaining in their hands to such person, persons or corporation as the Court shall adjudge entitled thereto.

3. That the amount of personal property remaining in the hands of said executors after paying said debts and legacies, and disbursements to May 9, 1906, together with the approximate value thereof as fixed by the duly appointed appraisers of the Estate, is as follows:

	Cash in hands of Executors on May 9, 1906.....	$32,424.54
3	Mortgage of Cordelia H. Brown, secured, tract of land at Waikiki, containing 1.19 acres, mortgage dated June 10, 1899, at 6% and recorded in Liber 117, page 100, balance due.....	2,500.00
	(And interest from Dec. 10, 1904)	
	Note of Cecil Brown dated Jan. 2, 1902, at 4½% secured by:	
	Certificate No. 206 for 30 shares First Nat. Bk.	
	Certificate No. 209 for 67 shares First Nat. Bk.	
	Certificate No. 156 for 20 shares Mut. Tel. Co.	
	Certificate No. 122 for 10 shares Mutual Tel. Co.	
	Certificate No. 6 for 355 shares Mutual Tel. Co.	
	Certificate No. 166 for 20 shares Oahu Sugar Co.	
	Certificate No. 1087 for 6 shares Oahu Sugar Co.	
	Certificate No. 2191 for 7 shares Oahu Sugar Co.	
	Certificate No. 2192 for 7 shares Oahu Sugar Co.	
	Certificate No. 1961 for 2 shares Oahu Sugar Co.	
	Certificate No. 3583 for 10 shares Oahu Sugar Co.....	15,000.00
	(And interest from January 2/06)	
	Waialua Agricultural Co. stock:	
	Certificate No. 641 for 20 shares	
	Certificate No. 642 for 20 shares	
	Certificate No. 643 for 20 shares	
	Certificate No. 644 for 20 shares	
	Certificate No. 645 for 20 shares	
	Certificate No. 3003 for 40 shares	
	Certificate No. 3006 for 20 shares	
	Certificate No. 3012 for 25 shares	
	Certificate No. 3014 for 10 shares	
	Certificate No. 3018 for 5 shares	
	Certificate No. 3097 for 20 shares	
	Certificate No. 3098 for 30 shares	
	Total ..... 250 shares at $70.....	17,500.00

Bank of Hawaii:	
Deposit with Savings Department Certificate No. 367... (And interest at 4% from Apr. 2/06)	25,000.00
Oahu Railway bonds, 6%:	
Nos. 1926, 1927 and 1928 at $103..... (And interest from January 1/06)	3,090.00
Hilo Railway bonds:	
Nos. 351 to 360 inclusive at $1,000. (at $60.)..... (And interest from April 1/06)	6,000.00
Waialua Agricultural Co. bonds:	
20 Bonds at $1000. each 5%, Nos. 622–641 inclusive at $980..... (And interest from April 1/06)	19,600.00
Total value.....	$121,114.54

4 4. That the said George Galbraith died seized and possessed of certain real estate situate within the Island of Oahu, Territory of Hawaii, which is now in the possession of said Hawaiian Trust Company, Limited, claiming as residuary devisee and trustee under said Will, which real estate is as follows:

a. Land at Wahiawa, Oahu, being R. P. Grants 606, 695, 604, 682, 1125, 848, 1127, 345 and 850, containing area of 2554 acres, except a portion thereof now occupied or claimed by Hugh Galbraith, which land, with the exception aforesaid, was leased by said George Galbraith to James B. Atherton, at a rental of $10,000.00 a year, under lease dated September 17, 1900, for 50 years from the date of the lease, the approximate value of same as fixed by said appraisers being—$125,000.00.

b. A parcel of land at corner of Nuuanu Avenue and Pauoa Street, Honolulu, being R. P. 534, L. C. A. 5957, and containing ¼ acre, occupied by said George Galbraith at the time of his death, and at present producing no income, the approximate value thereof as fixed by said appraisers being $3,500.00;

5. That said George Galbraith died seized and possessed of certain real estate situated in Ireland, to wit:

a. Farm of land situated at Ringneal, Comber, County of Down, now in the occupation of William Galbraith, held by said George Galbraith under an agreement to purchase under the Irish Land Purchase Acts. Estimated value, £750 (or about $3525.)

b. Licensed premises situate in the Townland of Ballydrain, at present let on lease to one Martin. Estimated value, £200 (or about $940.)

c. Dwelling house situate in Euston Street, Ballymacarrett, City of Belfast. Estimated value, £95 (or about $450.)

6. That at the time of the death of said George Galbraith there was personal property belonging to him in Ireland, to wit:

5 *a.* Mortgage for £700 (or about $3300.) charged upon two farms of land owned by Eliza Fitchie, testator's sister, now deceased, all the interest of which had been paid up till the death of testator.

b. £500 (or about $2350.00) in cash in the hands of Messrs. Shean & Dickson, Solicitors, 16 High Street, City of Belfast.

(Letters of administration with the will annexed of the estate of said George Galbraith in Ireland have been granted to Mr. David Gordon Dickson, of said firm of solicitors.)

7. That the said George Galbraith at the time of his death was unmarried and left no legitimate children.

8. That the heirs of said George Galbraith according to the laws of the Territory of Hawaii according to the information and belief of the parties hereto are as follows:—

a. His sister, Eliza Fitchie, deceased testate since the death of said George Galbraith.

b. Six living children of his deceased brother, Samuel Galbraith, to wit: John Galbraith, William Galbraith, Samuel Galbraith, Martha Cully and Margaret Jane Rome, parties hereto and Hugh Galbraith, of Wahiawa, Island of Oahu, Territory of Hawaii.

9. That said Hannah Fitchie and Barry Fitchie are the duly qualified and acting executors under the Will of said Eliza Fitchie, deceased, and as such are parties hereto and that said Hannah Fitchie, Barry Fitchie and Eliza French were the only living children of said Eliza Fitchie at her death and are her heirs and next of kin and the sole beneficiaries under the Will of said Eliza Fitchie;

10. That the parties hereto are desirous of obtaining a construction of the said Will of the said George Galbraith, particu-
6 larly as to the trust therein set forth, and instructions thereon, in accordance with the questions herein submitted, and are entitled to maintain one or more bills for instructions or bills for construction of said will and trust, pursuant to which said will and trust would be construed and instructions given thereon by the Courts of this Territory.

11. That the Rule in Shelley's Case is part of the common law of Ireland and in force therein; that under the law of Ireland the rules of descent governing the devolution of the real property of deceased intestates differ from the rules of distribution governing the devolution of the personal property of deceased intestates, by reason of which difference the persons taking the real estate of a deceased intestate as heirs may not be the same as those taking the personal estate of such deceased intestate as his next of kin; that under the law of Ireland, land purchased under the Irish Land Purchase Acts upon the intestacy of the owner descends as personal estate and is distributable as such according to the Irish law of distribution.

12. That said Hawaiian Trust Company, Limited, is a corporation duly organized and existing under the laws of the Territory of Hawaii, and claims to be empowered under its articles of association and amendments thereto, a copy of which is hereunto attached, marked Exhibit "B" and made a part hereof, to act as a trust com-

pany under the laws of the Territory of Hawaii respecting corporations and in particular under Act 68 and Act 69 of the Session Laws of 1905 in said Territory by virtue of a certificate issued to it by the Treasurer of this Territory purporting to be in accordance with Section 1 of said Act 69, a copy of which said certificate is hereunto attached, marked Exhibit "C" and made a part hereof.

7 Upon the foregoing facts, the parties hereto pray the instructions of this Court and its construction of the said will of the said George Galbraith and the said trust therein set forth in accordance with the following questions:

1. Is the trust as to the residue of the estate wholly invalid?

2. Is said trust wholly valid?

3. If said trust is wholly valid, when does it end?

4. If said trust is wholly valid, to whom and in what proportions is the trust fund payable upon the final ending of said trust?

5. If said trust is neither wholly invalid nor wholly valid, what part of it is valid?

6. Is there an intestacy as to any portion of the corpus of the residue of the testator's estate?

(*a*) Who are the heirs and next of kin of the testator and by what law are they to be determined?

(*b*) How is the intestate portion of the residue of the corpus and the amount thereof to be ascertained, and when and by whom can payment of such intestate portion be demanded?

7. Is there an intestacy as to the annual income remaining after payment of the annuities bequeathed by the will, and, if so, to whom and in what proportions is said surplus income payable?

8. If there is not an intestacy as to the surplus income annually accruing, to whom and when does it become payable; and what are the duties of the trustee relative thereto?

8 9. What estates or rights do the annuitants specifically named other than those "who are to receive only their life annuities", and their "heirs" respectively take under the trust?

10. Who are the "heirs" of the annuitants and by what law are they to be determined?

11. Are any or all of the annuitants under the trust entitled to claim appropriations from the corpus of the trust fund sufficient to produce their respective annuities, and the payment to them respectively of such appropriated portions?

(*a*) Upon what basis will the amount of the capital sum be calculated, and at what time or times can said annuitants so entitled, first demand such appropriations, and, second, call upon the trustee to transfer to them respectively the shares of the corpus so appropriated.

12. Can the Hawaiian Trust Company, Limited, act as trustee under the Will?

Dated, Honolulu, T. H. June 14, 1906.

HAWAIIAN TRUST COMPANY, LIMITED,
(Sgd.) By E. D. TENNEY, *Its President, and*
(Sgd.) Z. K. MYERS, *Its Secretary.* [SEAL.]

(Sgd.) BALLOU & MARX,
Attorneys for Hawaiian Trust Company, Limited.

JOHN GALBRAITH,
(Sgd.) By HOLMES & STANLEY, *His Attorneys.*
HANNAH FITCHIE AND
BARRY FITCHIE,
Executors Under the Will of Eliza Fitchie, Deceased.

9 (Sgd.) By HOLMES & STANLEY, *Their Attorneys.*
HANNAH FITCHIE,
ELIZA FRENCH,
BARRY FITCHIE,
WILLIAM GALBRAITH,
SAMUEL GALBRAITH,
MARTHA CULLY, AND
MARGARET JANE ROME,
(Sgd.) By W. L. STANLEY, *Their Attorney in Fact.*

(Sgd.) HOLMES & STANLEY,
Attorneys for Hannah Fitchie, Eliza French, Barry Fitchie, John Galbraith, William Galbraith, Samuel Galbraith, Martha Cully, and Margaret Jane Rome and Hannah Fitchie and Barry Fitchie, as Executors Under the Will of Eliza Fitchie, Deceased.

(Sgd.) CECIL BROWN,
(Sgd.) W. O. SMITH,
Executors Under the Will of George Galbraith, Deceased.
(Sgd.) By SMITH & LEWIS AND
C. H. OLSON, *Their Attorneys.*

(Sgd.) SMITH & LEWIS AND
C. H. OLSON,
Attorneys for Cecil Brown and W. O. Smith, Executors Under the Will of George Galbraith, Deceased.

(Sgd.) HUGH GALBRAITH.

ISLAND OF OAHU, *Territory of Hawaii, ss:*

Z. K. Myers, William L. Stanley, and Cecil Brown and Hugh Galbraith being duly sworn, each for himself says: That he has read the foregoing Agreed Statement of Facts and knows the contents thereof; that there is a real controversy between the parties to the

above entitled Submission depending upon the facts in said Statement contained; and that these proceedings are brought in good faith to determine the rights of said parties to said Submission.

Said Z. K. Myers further says that he is the secretary of the Hawaiian Trust Company, Limited, one of said parties to said Submission, and, as such, is authorized to make, and makes, this affidavit on behalf of said Hawaiian Trust Company, Limited;

Said William L. Stanley further says that he is the attorney of Hannah Fitchie and Barry Fitchie, Executors under the Will of Eliza Fitchie, deceased, and of John Galbraith, parties to said Submission, and the attorney in fact of Hannah Fitchie, Eliza French, Barry Fitchie, William Galbraith, Samuel Galbraith, Martha Cully and Margaret Jane Rome, parties to said Submission, and as such, is authorized to make, and makes, this affidavit on their behalf.

Said Cecil Brown further says that he and W. O. Smith are the executors under the Will of which a copy is contained in said Statement, to wit, the Will of George Galbraith, deceased; and that they in their capacities as such executors are parties to said Submission.

(Sgd.) Z. K. MYERS.
(Sgd.) W. L. STANLEY.
(Sgd.) CECIL BROWN.
(Sgd.) HUGH GALBRAITH.

Subscribed and sworn to by the said Hugh Galbraith this 9th day of October 1906 before me.

(Sgd.) L. P. SCOTT,
Clerk Circuit Court First Circuit.

Subscribed and sworn to before me this 14th day of June, 1906.

(Sgd.) WM. J. FORBES,
Notary Public First Judicial Circuit,
Territory of Hawaii. [SEAL.]

EXHIBIT "A."

I, George Galbraith, of Honolulu, T. H., being of sound mind and memory, do declare this to be my last Will and Testament revoking all others.

1st. I nominate and appoint as Executors of this my last Will and Testament, Cecil Brown and W. O. Smith, both of Honolulu, Territory of Hawaii.

2nd. I give, bequeath and devise unto the following person, and persons, the sums herein set forth, the same to be free and clear of all taxes.

(S'g'd) George Galbraith.

3rd. To Anne Jane Galbraith, my second cousin, of Euston Street, Mount Pottinger, Belfast, Ireland, the sum of Five Hundred dollars ($500.)

4th. To Minnie Galbraith, my second cousin, of Ballymacarrett, Belfast, Ireland, the sum of Two Hundred and Fifty Dollars, ($250.)

5th. To George Fitchie, my nephew's son, of Belfast, Ireland, the sum of Five Hundred Dollars, ($500.)

6th. To Polly Smith, of Ballydrain, County Down, Ireland, the sum of Two hundred and Fifty Dollars, ($250.)

7th. To the children of my deceased brother, Sam Galbraith of Ringneal, County Down, Ireland, the sum of Six thousand dollars ($6000.) to be divided share and share alike.

8th. To the children of my sister, Eliza Fitchie, of Ballydrain, County Down, Ireland, the sum of Five thousand dollars, ($5000.) to be divided share and share alike.

9th. To the children of my deceased sister, Sarah Patton, the sum of Two thousand dollars, ($2000.) share and share alike.

12 10th. To Susanna Galbraith, my second cousin's wife, of Belfast, Ireland, the sum of Two thousand dollars, ($2000.)

11th. To the children of my deceased first cousin, John Galbraith, of Ballywilliam, near Comber County Down, Ireland, the sum of Two thousand dollars, ($2000.), share and share alike.

12th. To my niece, Martha Dickinson, of Ringneal, County Down, Ireland, the sum of One Thousand dollars, ($1000.)

13th. To my niece, Hannah Fitchie, of Ballydrain, County Down, Ireland, the sum of One thousand dollars, ($1000.)

14th. To Maude Fitchie, my nephew's daughter, of Ballydrain, County Down, Ireland, the sum of One hundred dollars, ($100.)

(S'g'd.) George Galbraith.

15th. To the two nieces of Kitty Johnston, of Comber, County Down, Ireland, the sum of Five hundred dollars ($500.) each, said nieces are both named Mary.

16th. To Josie Fink of Alameda, California, the sum of One thousand dollars, ($1000.)

17th. To Emma Douglass, of Alameda, California, the sum of One thousand dollars ($1000.)

18th. To my nephew, Hugh Galbraith, of Wahiawa, Oahu, Territory of Hawaii, the sum of One thousand dollars, ($1000.)

19th. To Manuia, of Kaalaea, Oahu, Territory of Hawaii, the sum of One thousand dollars, ($1000.)

20th. To John Kailuli, alias Galbraith, of Honolulu, Territory of Hawaii, the sum of One thousand dollars, ($1000.)

21st. To Lui Warren, of Ewa District, Oahu, Territory of Hawaii, the sum of Two hundred and fifty dollars, ($250.)

22nd. To Cecil Brown, of Honolulu, Territory of Hawaii, the sum of One thousand dollars, ($1000.)

23rd. To H. M. Von Holt, of Honolulu, Territory of Hawaii, the sum of One thousand dollars, ($1000.)

13 24th. To Mrs. Mackintosh (sister of Cecil Brown) of Honolulu, Territory of Hawaii, the sum of Five hundred dollars, ($500.)

25th. To Helena Fonseca, of Honolulu, Territory of Hawaii, the sum of Five hundred dollars, ($500.)

26th. To Robert William Cathcart, of Honolulu, Territory of Hawaii, the sum of Two thousand dollars, ($2000.) or to his heirs, if deceased.

27th. To the five children of H. M. Von Holt, of Honolulu, Territory of Hawaii, the sum of Five hundred dollars each.

28th. To the five children of Robert William Cathcart, of Honolulu, Territory of Hawaii, the sum of Five hundred dollars ($500.) each, said children are named as follows,—Heleualani, Helen Mary, William Andrew Poaha, Edwin, and Arthur, and I desire that the aforesaid Robert William Cathcart act as trustee for his aforesaid five children.

(Sgd.) George Galbraith.

The balance, residue or remainder of my estate is to be placed in trust for as long a period as is legally possible, the termination or ending of said trust to take place when the law requires it under the statute.

I hereby nominate and appoint the Hawaiian Trust Company, Limited, of Honolulu, Territory of Hawaii, as trustee of the aforesaid balance, residue or remainder of my estate and they are to devote sufficient of the annual income derived from the same toward paying the following annuities, which are to be free and clear of all taxes, unto the following persons mentioned, namely,

Sam Galbraith's children, aforementioned	.....	$1500.	yearly
Eliza Fitchie	"	1500.	"
Barry Fitchie's children, of Ballydrain, County Down, Ireland	.....	300.	"
14 Anne Jane Galbraith aforementioned	.....	$150.	yearly
Minnie Galbraith	"	150.	"
Sarah Patton's children	"	300.	"
John Galbraith's children	"	500.	"
Kittie Johnston's two nieces	" (each)....	100.	"
Maude Fitchie	"	150.	"
Martha Dickinson	"	100.	"
Manuia	"	250.	"
J. Kailuli, alias Galbraith	"	250.	"
Robert William Cathcart's children	"	250.	"
Hugh Galbraith	"	360.	"
Hugh Galbraith's seven children	.....	2520.	"
Josie Fink aforementioned	.....	150.	"
Emma Douglass	"	150.	"
Matilda Bailey, Ballydrain, Co. Down, Ireland	.....	50.	"

(Sgd.) George Galbraith.

All of the foregoing for life, and then to their heirs, save and excepted the last three persons, namely, Josie Fink, Emma Douglass and Matilda Bailey, who are to receive only their life annuities and at their death all their interests to cease.

On the final ending and distribution of the trust, the trust fund to be divided equally amongst those persons entitled at that time to the aforementioned annuities.

In Witness whereof I have hereunto set my hand this 21 day of January, nineteen hundred and four, at Honolulu, Territory of Hawaii, U. S. A.

(Sgd.) GEORGE GALBRAITH.

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Signed, published and declared by the said George Galbraith as and for his last will and testament in the presence of us, who at his request, in his presence, and in the presence of each other, have hereunto set our names as witnesses thereto.

Honolulu, Territory of Hawaii, 21st day of January, 1904.

(Sgd.) GEO. L. BIGELOW,
Honolulu, T. H.

(Sgd.) F. F. FERNANDES,
Honolulu, T. H.

15 Codicils to my last Will and Testament of January 21 nineteen hundred and four, which are hereby annexed and made a part thereof.

1st. Whereas, my nephew, Hugh Galbraith, of Wahiawa, Oahu, T. H., has been provided for by me in my last Will and Testament under paragraph number eighteen, I therefore revoke his participation in and to any of the bequests and benefits devised unto the children of the late Sam Galbraith. Furthermore the annuity devised to the aforesaid Hugh Galbraith and his heirs, I hereby revoke and substitute for it the following—To my nephew, Hugh Galbraith, of Wahiawa, Oahu, T. H., Three hundred dollars ($300.) yearly, for life only.

2nd. The annuity devised unto the seven children of the aforesaid Hugh Galbraith, I hereby revoke and substitute for it the following—To Hugh Galbraith's seven children, Twenty one hundred dollars ($2100.) yearly, for life, and then to their heirs.

3rd. I bequeath and devise unto the Kona Orphanage, of Kona, Hawaii, T. H., the sum of One Hundred dollars, ($100.) yearly, under the same conditions as the other annuitants mentioned, save and excepted, Hugh Galbraith, Josie Fink, Emma Douglass, and Matilda Bailey.

In Witness Whereof I have hereinto set my hand this 21 day of January, nineteen hundred and four, at Honolulu Territory of Hawaii. U. S. A.

(Sgd.) GEORGE GALBRAITH.

Signed, published and declared by the said George Galbraith, as and for codicils to his last Will and Testament in the presence of us, who at his request, in his presence, and in the presence of each other, have hereunto set our names as witnesses thereto.

Honolulu, Territory of Hawaii, 21st day of January, 1904.

(Sgd.) GEO. L. BIGELOW,
Honolulu, T. H.

(Sgd.) F. F. FERNANDEZ,
Honolulu, T. H.

16 EXHIBIT "B."

Articles of Association of the Hawaiian Trust Co., Ltd.

Know all men by these presents: That we, the undersigned, each of Honolulu, Island of Oahu, one of the Hawaiian Islands, desiring to become incorporated as a Joint Stock Company, do hereby enter into these Articles of Association and certify to and make known as follows:—

First. That the name of the corporation shall be the Hawaiian Trust Company, Limited.

Second. That the place of its principal office shall be at Honolulu, Island of Oahu, one of the Hawaiian Islands.

Third. That the purposes of the Corporation are for doing such business and undertaking that it may in and by its corporate name take, receive and hold and repay, reconvey and dispose of any effects and property both real and personal, which may be granted, committed, transferred or conveyed to it, with its consent, upon any terms or upon any trust or trusts whatsoever at any time or times by any person or persons including married women or minors, body or bodies corporate or by any court; and to administer, fulfill and discharge the duties of such trust or trusts, for such remuneration as may be agreed upon; and that it may have power to act generally as agents or attorneys for the transaction of business, the management of estates, the collection of rents, interest, dividends, mortgages bonds, notes and securities for monies; and that it may also act as agent for the purpose of buying and selling, issuing, negotiating and registering, transferring or countersigning the certificates of stock, bonds or other obligations of any corporation, association or municipality, and to manage any sinking fund therefor on such terms as may be agreed upon; and that it may accept and execute
17 offices of executor, administrator, trustee and assignee, or guardian, of any minor, incompetent person, lunatic or any person subject to guardianship; that it may loan money upon real estate and collateral security, and execute and issue its notes and debentures, payable at a future date, and to pledge its mortgages on real estate and other securities as security therefor, but nothing contained herein shall be construed as giving the right to issue bills to circulate as money; or buy or sell bank exchange or do a general banking business; that it may take and receive from any individual or corporation on deposit for safe keeping and storage, gold and silver plate, jewelry, money, stock, securities and other valuable and personal property, and to rent out the use of safes or other receptacles, upon such terms and for such compensation as may be agreed upon, and also to become sureties for administrators, guardians or other trustees or persons in cases where by law or otherwise one or more sureties are required or that it may become agent for such a surety company; and that it may guarantee or insure to grantees the validity of titles in real estate transfers, at a rate of compensation and upon such terms and conditions as may be agreed upon;

that it may lease, purchase, hold, and convey all such personal estate as may be necessary to carry on its business or that it may be necessary to acquire in the enforcement or settlement of any claims or demands arising out of its business transactions and to execute and issue in the transaction of its business all necessary receipts, certificates, papers and contracts, which shall be signed by such person as may be designated in the by-laws and that it may lease, purchase, hold and convey real estate as its corporate property; that it may take and accept, by grant, assignment, purchase, transfer,
18 devise or bequest, and hold any real or personal estate in trust in pursuance of the direction of any trust created in accordance with law; that it may act as Agents of Fire and Life and Accident Insurance Companies and do a general trust, deposit and security business; to transact any other business or undertaking trust, mercantile or otherwise, which may be necessary, useful or convenient to the main purposes of the Corporation; to purchase, hold and sell the stock in other corporations.

Fourth. That the amount of the Capital Stock shall be Thirty Thousand Dollars ($30,000.) divided *with* equal shares of the par value of one hundred dollars, with the privilege after notice to the Minister of Interior or any other officer authorized by law in the premises, of subsequent extension from time to time of the capital stock to a sum not to exceed Five Hundred Thousand Dollars ($500,000.) for the entire capital stock of the Corporation.

Fifth. That the Officers of the Corporation shall consist of a President, Vice-President, Secretary, Treasurer and Auditor, and such Officers shall constitute a Board of Directors.

Sixth. That the said Corporation shall have corporate existence for the term of fifty years under the name and style of Hawaiian Trust Company, Limited, and shall have all the powers and be subject to all the liabilities now provided by the law for all incorporated companies and be subject to all laws hereafter enacted in regard to corporations, and no stockholder shall be liable for the debts of the Corporation beyond the amount which may be due and unpaid on the share or shares owned by him.

Seventh. That the said Corporation may borrow money for the purpose of its business in such amounts as may from time to
19 time be required, and as security for the payment thereof, may make, execute and deliver such mortgages on its property or any portion thereof as may be necessary, or it may issue bonds or deeds for the payment of such debts.

Eighth. That said Corporation shall have power to sue and be sued in its corporate name in all courts whatsoever and to make and use a common seal and alter the same at its pleasure to acquire, hold, purchase and convey real and personal estates as may be convenient or useful; to appoint such subordinate officers and agencies as the business of the corporation may at any time require; to make by-laws not inconsistent with any law for the management of its property, the election and removal of officers, the regulation of its affairs and the transfer of its stock and to all other acts and things

as may be necessary, useful or convenient to the exercise of the powers enumerated herein.

Service of process upon any one of the Officers shall be deemed good and lawful service upon the Corporation.

In Witness Whereof the parties have hereunto set their hands and seals this 10th day of August, A. D. 1898.

GEORGE R. CARTER.
C. H. COOKE.
F. C. ATHERTON.
P. C. JONES.
R. W. ATKINSON.

On the tenth day of August A. D. 1898 personally appeared before me George R. Carter, C. H. Cooke, F. C. Atherton, P. C. Jones and R. W. Atkinson, known to me to be the persons described in and who executed the foregoing instrument, who severally acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein set forth.

[SEAL.] HARRIET E. WILDER,
Notary Public.

20 EXHIBIT "C."

TERRITORY OF HAWAII, *Honolulu, County of Oahu, ss:*

Office of the Treasurer.

To all to whom these presents may come:

I, A. J. Campbell, Treasurer of the Territory of Hawaii, Send Greeting—

Whereas, the Hawaiian Trust Company, Limited, a corporation duly organized and existing under the laws of the Territory of Hawaii, has applied for a Certificate to qualify it to act as a Trust Company in the Territory of Hawaii in conformity with the provisions of Act 69 of the Sessions Laws of 1905, and

Whereas, it appearing satisfactorily to me that the said Hawaiian Trust Company, Limited, has complied with all the provisions required by Section 2 of said Act 69 and is lawfully entitled to a Certificate qualifying it to act as a Trust Company,

Now Therefore Know Ye, that in consideration of the premises and no good reason to the contrary appearing, I do hereby certify that the Hawaiian Trust Company, Limited, is duly qualified to act as a Trust Company under Section 2 of said Act 69 of the Session Laws of 1905, and do by these presents grant this Certificate qualifying it to act as a Trust Company in the Territory of Hawaii and to have all the powers and privileges conferred upon such companies by said Act 69, in addition to the general powers conferred by law upon corporations and joint stock companies.

21 In Witness Whereof, I do hereby set my hand and Seal of the Treasurer's Office, Territory of Hawaii, at Honolulu, this 26th day of June, A. D. 1905.

[SEAL.] (S.) A. J. CAMPBELL,
Treasurer of the Territory of Hawaii.

Endorsed: Supreme Court Territory of Hawaii. Hannah Fitchie, Barry Fitchie, Hannah Fitchie and Barry Fitchie, Executors under the Will of Eliza Fitchie, dec., Eliza French, John Galbraith, William Galbraith, Samuel Galbraith, Martha Cully, and Margaret Jane Rome *v.* Cecil Brown and W. O. Smith, Executors under the Will of George Galbraith, deceased, and Hawaiian Trust Company, Limited. Submission on Agreed Statement of Facts. Dated June 14th, 1906. Filed June 14th, 1906 at 3:05 P. M. L. P. Scott, Clerk. S. C. No. 131. Registered Vol. 1, Page 105. Smith & Lewis Attorneys at Law. Judd Building. Honolulu, T. H.

21*a* In the Supreme Court of the Territory of Hawaii.

HANNAH FITCHIE, BARRY FITCHIE; HANNAH FITCHIE and BARRY FITCHIE, Executors under the Will of Eliza Fitchie, Deceased; ELIZA FRENCH, JOHN GALBRAITH, WILLIAM GALBRAITH, SAMUEL GALBRAITH, MARTHA CULLY, and MARGARET JANE ROME

v.

CECIL BROWN and W. O. SMITH, Executors under the Will of George Galbraith, Deceased, and HAWAIIAN TRUST COMPANY, LIMITED.

Submission on Agreed Statement of Facts.

Motion.

Now comes Hugh Galbraith, one of the heirs at law of George Galbraith, deceased, named in the "Submission on Agreed Statements of Facts" filed herein and moves this Honorable Court that he be allowed to appear herein as one of the parties plaintiff to the said Submission to the intent that he may be bound by all the proceeding- to be had herein.

Dated, October 9, 1906.

(Signed) HUGH GALBRAITH.

HOLMES & STANLEY,
Att'ys for Hugh Galbraith.

Endorsed: In the Supreme Court of the Territory of Hawaii. Hannah Fitchie *et al. v.* Cecil Brown, *et al.* Motion. Filed October 9, 1906, at 9:58 A. M. J. A. Thompson, Clerk.

22 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

HANNAH FITCHIE, BARRY FITCHIE; HANNAH FITCHIE and BARRY FITCHIE, Executors under the Will of Eliza Fitchie, Deceased; ELIZA FRENCH, JOHN GALBRAITH, WILLIAM GALBRAITH, SAMUEL GALBRAITH, MARTHA CULLY, and MARGARET JANE ROME,

v.

CECIL BROWN and W. O. SMITH, Executors under the Will of GEORGE GALBRAITH, Deceased, and HAWAIIAN TRUST COMPANY, LIMITED.

Submission on Agreed Statement of Facts.

Argued October 8, 9, 10, 1906; Decided November 1, 1906.

Frear, C. J., Hartwell and Wilder, JJ.

Will—construction—rule against perpetuities—trust for accumulation.—The will, after providing for legacies, contained the following provision: "The balance, residue or remainder of my estate is to be placed in trust *for as long a period as is legally possible*, the termination or ending of said trust to take place *when the law requires it under the statute*. I hereby nominate and appoint The Hawaiian Trust Company, Limited, of Honolulu, Territory of Hawaii, as trustee of the aforesaid balance, residue or remainder of my estate and they are to devote sufficient of the annual income derived from the same toward paying the following annuities which are to be free and clear of all taxes, unto the following persons mentioned, namely." (here naming some 42 annuitants, including the testator's heirs and next of kin,
23 and fixing the amount of each annuity). "All of the foregoing for life, and then to their heirs, save and excepted the last three persons, namely, Josie Fink, Emma Douglass and Matilda Bailey, who are to receive only their life annuities and at their death all their interests to cease. *On the final ending and distribution of the trust, the trust fund to be divided* equally amongst those persons entitled at the time to the aforementioned annuities." A codicil substituted an annuity to H. G. of "$300 yearly for life only" for the annuity of $360 given him in the will "to him and his heirs," also substituting an annuity to his children and their heirs of $2100 in place of $2520 in the will, and giving the Kona Orphanage "$100 yearly, under the same conditions as the other annuitants mentioned, save and excepted" the four persons to whom were given life annuities only. Held: The will established a valid trust for payment from the income of the trust property of the annuities payable by the provisions of the will to the four persons therein named

for their respective lives and for payment of the other annuities payable by the will, to the other annuitants therein named, to themselves for and during their respective lives and thereafter to pay the same to their heirs respectively until the end of 21 years after the death of the last survivor of all of said annuitants and during the same period of time to pay to the Kona Orphanage the annuity directed in the will, and at the end of said 21 years to divide the trust fund and its accumulated and unapplied income as required by the will. The trust is implied for accumulation of the income not required for taxes and for costs and charges of administering the trust and for payment of the annuities. The testator's intention, to be as-
24 certained from the various provisions in the will, was that the division of the trust fund, including therein the accumulated income, should be made by the trustee and that such division should be "the final ending and distribution of the trust;" also that the trust, meaning to include therein the division of the fund, was to terminate by such division "when the law requires it," being the period fixed by the rule against perpetuities at the end of the 21 years after the death of the last surviving annuitant. The will clearly intends the lives of the annuitants as "the lives of persons in being" under the rule against perpetuities which rule is law in Hawaii under Sec. 1, R. L.

Corporation—incorporated under articles of association as joint stock company—capacity to take as trustee.—In conformity with the view of the court expressed in *Hackfeld v. King*, 11 Haw. 5, the Hawaiian Trust Company, Limited, is lawfully authorized to do a trust business as mentioned in its articles of association.

25 Statement of the Case.

This is a submission on a case agreed between the heirs of the late George Galbraith and the executors and trustee under his will asking adjudication of certain matters in controversy between them. The facts agreed upon are as follows: Galbraith, a native of Ireland and for many years next preceding and at the time of his death domiciled in Honolulu, died November 5, 1904, leaving a will executed together with a codicil in Honolulu January 21, 1904, and admitted to probate March 24, 1905, before a judge of the first circuit. The executors, having paid the decedent's debts and the legacies, desire to distribute the residue of the estate to such persons or corporation as the court shall adjudge entitled thereto. The personal property in their hands consists of $57,424.54 cash, notes secured by mortgages of land and stocks in the Territory $17,500 and stocks and bonds of Hawaiian corporations appraised at $46,190, all aggregating $121,114.54, not including certain interest accrued. The decedent left real estate in this Territory, now in possession of the trustee, consisting of land at Wahiawa under

lease for 50 years from September 17, 1900, at an annual rental of $10,000, appraised at $125,000 and land in Honolulu appraised at $3500. He left in Ireland a farm, held under an agreement to purchase under the Irish land purchase acts, valued at $3525, licensed premises valued at $940 and a dwelling house valued at $450. There was at the time of his death certain personal property belonging to him in Ireland, namely, a mortgage for $3300 upon two farms and $2350 cash with solicitors in Belfast. He died unmarried without leaving legitimate children. His heirs by the laws of this Territory are, according to the information and belief of the parties, his sister Eliza Fitchie, who has deceased testate since his death, and six children of his deceased brother Samuel Galbraith who, with the executors of the will of the deceased sister who are also
26 her heirs and next of kin and sole beneficiaries under her will, are parties to the submission.

It is agreed that the rule in *Shelley's* case is law in Ireland where, by the rules of descent of real property and distribution of personal property of intestate estates, the heirs may not be the distributees and that, under the Irish law of distribution of intestate estates, land purchased under the land purchase acts is distributable as personal estate; that the Hawaiian Trust Company, named as trustee, is a corporation organized and existing under the laws of this Territory and claims to be empowered under its articles of association to act as a trust company under the laws of the Territory respecting corporations and particularly under Acts 68 and 69 of the Laws of 1905 by virtue of the certificate issued to it by the treasurer of the Territory purporting to be in accordance with Sec. 1 of Act 69, copies of the articles of association and amendments and of the certificate being attached to the agreement.

The will provides for the payment of legacies of $500 to Anne Jane Galbraith and $250 to Minnie Galbraith, both second cousins; $500 to George Fitchie, a nephew's son; $250 to Polly Smith; $6,000 to be divided between the children of Samuel Galbraith, a deceased brother; $5,000 equally to the children of a sister, Eliza Fitchie; $2,000 to the children of a deceased sister, Sarah Patton; $2,000 to Susannah Galbraith, wife of a second cousin; $2,000 equally to the children of John Galbraith, a deceased first cousin; $1,000 each to two nieces, Martha Dickinson and Hannah Fitchie; $100 to Maud Fitchie, a nephew's daughter; $500 each to two nieces of Kittie Johnston; $1,000 each to Josie Fink and Emma Douglass, each of Alameda, California, to the nephew, Hugh Galbraith, Manuia, of Kalaea, Oahu, John Kailuli alias Galbraith, of Honolulu, and to Cecil Brown and H. M. von Holt, each of Honolulu; $250 to Lui Warren, of Ewa, Oahu; $500 each to Cecil Brown's sister, Mrs. Mackintosh and Helena Fonseca, each of Honolulu; $2,000
27 to Robert William Cathcart, of Honolulu, "or to his heirs if deceased;" $500 each to the five children of H. M. von Holt and to the five children of Robert William Cathcart, the legacies amounting to $36,850. Then come the portions of the will which give rise to the controversy, namely:

"The balance, residue or remainder of my estate is to be placed

in trust for as long a period as is legally possible, the termination or ending of said trust to take place when the law requires it under the statute.

"I hereby nominate and appoint the Hawaiian Trust Company, Limited, of Honolulu, Territory of Hawaii, as trustee of the aforesaid balance, residue or remainder of my estate and they are to devote sufficient of the annual income derived from the same toward paying the following annuities, which are to be free and clear of all taxes, unto the following persons mentioned, namely,

Sam Galbraith's children, aforementioned.....		$1500.	yearly
Eliza Fitchie,	"	1500.	"
Barrie Fitchie's children, of Ballydrain, County Down, Ireland		300.	"
Anne Jane Galbraith,	aforementioned...	150.	"
Minnie Galbraith,	" ...	150.	"
Sarah Patton's children,	" ...	300.	"
John Galbraith's children,	" ...	500.	"
Kittie Johnston's two nieces,	" (each)	100.	"
Maude Fitchie,	" ...	150.	"
Martha Dickinson,	" ...	100.	"
Manuia,	" ...	250.	"
J. Kailuli, alias Galbraith,	" ...	250.	"
Robert William Cathcart's children	" ...	250.	"
Hugh Galbraith,	" ...	360.	"
Hugh Galbraith's seven children,	" ...	2520.	"
Josie Fink,	" ...	150.	"
Emma Douglass,	" ...	150.	"
Matilda Bailey, Ballydrain, Co. Down, Ireland.....		50.	"

"All of the foregoing for life, and then to their heirs, save and excepted the last three persons, namely, Josie Fink, Emma Douglas and Matilda Bailey, who are to receive only their life annuities and at their death all their interests to cease.

"On the final ending and distribution of the trust, the trust fund to be divided equally amongst those persons entitled at that time to the aforementioned annuities."

The codicil revokes Hugh Galbraith's participation in any of the "bequests and benefits devised unto the children of the late Sam Galbraith" and substitutes for Hugh's annuity in the will of $360 for him and his heirs "$300 yearly for life only" and gives his children, in place of the $2520 in the will, "$2100 yearly for life" and then to their heirs; gives the Kona Orphanage of Kona, Hawaii, $100 "under the same conditions as the other annuitants mentioned save and excepted Hugh Galbraith, Josie Fink, Emma Douglass and Matilda Bailey." The life annuities amount to
28 $650, the other annuities to $7,700.

Upon these facts the parties ask for instructions and a construction of the will and the trust therein set forth in accordance with the following questions:

"1. Is the trust as to the residue of the estate wholly invalid?

"2. Is said trust wholly valid?

"3. If said trust is wholly valid, when does it end?

"4. If said trust is wholly valid, to whom and in what proportions is the trust fund payable upon the final ending of said trust?

"5. If said trust is neither wholly invalid nor wholly valid, what part of it is valid?

"6. Is there an intestacy as to any portion of the corpus of the residue of the testator's estate?

(*a*) Who are the heirs and next of kin of the testator and by what law are they to be determined?

(*b*) How is the intestate portion of the residue of the corpus and the amount thereof to be ascertained, and when and by whom can payment of such intestate portion be demanded?

"7. Is there an intestacy as to the annual income remaining after payment of the annuities bequeathed by the will, and, if so, to whom and in what proportions is said surplus income payable?

"8. If there is not an intestacy as to the surplus income annually accruing, to whom and when does it become payable; and what are the duties of the trustee relative thereto?

"9. What estates or rights do the annuitants specifically named other than those 'who are to receive only their life annuities,' and their 'heirs' respectively take under the trust?

"10. Who are the heirs of the annuitants and by what law are they to be determined?

"11. Are any or all of the annuities under the trust entitled to claim appropriations from the corpus of the trust fund sufficient to produce their respective annuities, and the payment to them respectively of such appropriated portions?

(*a*) Upon what basis will the amount of the capital sum be calculated, and at what time or times can said annuitants so entitled, first demand such appropriations, and, second, call upon the trustee to transfer to them respectively the shares of the corpus so appropriated?

"12. Can the Hawaiian Trust Company, Limited, act as trustee under the will?"

29 *Contention of the Heirs.*

"The rule against perpetuities, as part of the Common Law of England, is in force in this territory." R. L., p. 83.

"The right to a part of the trust fund on the final ending of the trust, is a future interest subject to a condition.

"The will directs that the residue is to be placed in trust for as long a period as is legally possible.

"The question is: When will the trust end—the trust that is to end before the trust fund is to be divided?

"The law will allow the vesting of a future interest subject to a condition, to be postponed 'as long as any person living at the moment of the Testator's death was in existence and during twenty-one years after the longest liver of any person then in existence.' *Pownall v. Graham*, 33 Beav. 242 at and the persons whose lives are

taken need have no interest in the estate. Lewis on Perpetuities Chap. XIII p. 167; Gray on Rule against Perpetuities (2nd Edn.) § 216. But as it would be '*impracticable* to ascertain' when the life of the last survivor of all persons in existence at the time of Testator's death would terminate (*Thellusson v. Woodford*, 11 Ves. Jr. 134 and 136); or, as such a number of lives are 'more than will admit of making out by reasonable evidence at what time the survivor ceases to exist' (*Thellusson v. Woodford*, 4 Ves. Jr. 290;) the direction or trust for division would 'tend to a perpetuity' and is therefore void. *Thellusson v. Woodford*, 11 Ves. 136.

"The Testator has not mentioned or indicated in his will any lives during which, and twenty-one years after, the division of the trust fund is to be postponed. The lives of the '40 odd' life annuitants named in the will cannot be taken, first, because Testator has not said they are to be taken and the Court cannot put words into the will to give it such an effect, *Seale v. Rawlins* (1892) App. Cases 342, at 343; and, second, because he has said the division of the trust fund is to be postponed for as long as is legally possible. If the lives of the '40 odd' life annuitants and twenty-one years after is not 'as long a period as is legally possible,' that period does not answer the words of the will. If the lives of the '40 odd' life annuitants and twenty-one years after, is longer than is legally possible, it also does not answer the words of the will. As the will does not disclose what Testator meant by these words, the direction or trust for division is therefore void for uncertainty. *In re Moore* (1901) 1 Ch. 936.

"The case is distinguishable from *Pownall v. Graham, supra*, as there the gift over to one of the children explains what the words, to apply the income for the use of Testator's brothers' children 'from year to year as the law in such cases admits' (following a series of life estates) mean.

"The Court there could not have adopted any other construction without defeating the expressed intention of the Testator and destroying the meaning of the words of the will.

"It is also distinguishable from the 'heirloom' cases cited by counsel for the trustee, as they are supported either as in *Shelley v. Shelley*, L. R., 6 Eq. Cases 540, on the ground that the trust was executory; or, as in *Harrington v. Harrington*, L. R., 5 H. L. (Eng. and Irish App. Cases) 67, on the ground that, as the heirlooms are held in trust for the person who, for the time being, shall be in actual possession of a settled estate, (*i. e.* an estate subject to the limitations creating an estate tail), the limitations are perfectly declared.

"If the Court hold that the lives to be taken are pointed out by the will, that such lives are those of the 40 odd life annuitants, it is open to the Court to say that '40 odd' lives (including seven classes of lives) are more than it will allow to be taken. Gray on Perpetuities § 218.

"The Common Law is not 'and has never been a fixed or rigid system.' The Rule against Perpetuities was laid down by the Courts. In laying down a rule that '40 odd' lives cannot be

taken, the Court would be merely taking the first steps to the development or establishment of a salutary new principle (in harmony with existing principles) to meet a new case.

"If the trust to divide is void for uncertainty, the annuities to the heirs of the life annuitants named, which are to continue for as long a period as is legally possible, are also void for uncertainty.

"The cases cited in support of the contention that the fact that one of a series of gifts is void does not invalidate the preceding gifts, are those where the preceding gifts are certain, where an estate would be cut down if the ultimate gift took effect. This ultimate gift failing, the preceding gifts take effect. But the exclusion of the ultimate gift here does not get rid of the direction that the trust for payment of legacies is only to continue 'for as long a period as is legally possible.'"

31 *Contention of the Executors.*

"The will directs that the residuary estate shall be placed in trust for as long a period as is legally possible, the termination of the trust to occur when the law requires it. It then defines the purpose of the trust, *i. e.*, to secure the payment of annuities to named persons for life and then, with several exceptions, to their heirs. This is the entire purpose of the trust, for the will then directs that on the termination of this trust, the trust fund shall then go to the persons at that time enjoying the annuities in equal shares.

"The indefinite duration of a trust is not in itself an objection to its validity. Gray's The Rule against Perpetuities, Sec. 235, *et seq.*

"The duration of a trust is measured by its purposes.

"We have found that the sole purpose of this trust is to secure the payment of the designated annuities.

"The words of limitation of these annuities are as follows: 'All of the foregoing for life and then to their heirs.' These are words of limitation of an estate in fee in real estate,—under the Rule in *Shelley's Case*, of an estate in fee in the named persons; otherwise, of an estate for life in the named persons, with the remainder in fee to their heirs.

"Words of limitation which, if applied to real estate, would describe an estate in fee, will, if applied to an annuity, describe a perpetual annuity. *Smith v. Pybus*, 9 Ves. Jr. 566.

"Further, by express direction in the will, this trust is to continue as long as legally possible. The longest possible period of duration of this trust, in fact, would be forever. The only kind of annuities, and the designated annuities form, we have found, the entire purpose of this trust and therefore measure its duration, that could continue forever, would be perpetual annuities.

"Perpetual annuities may legally be created and a trust to secure their payment, otherwise unobjectionable; is legally valid. *Smith v. Pybus*, 9 Ves. Jr. 566; *Mansergh v. Campbell*, 3 De G. & J. 232, 60 Eng. Ch. 232; *Hedges v. Harpur*, 3 De G. & J. 129, 60 Eng. Ch. 129; *Yates v. Maddon*, 16 Sim. 613, 39 Eng. Ch. 613; *Stokes v.*

Heron, 12 Cl. & F. 161; *Hicks v. Ross*, L. R., 14 Eq. 141; *Ex parte Wynch*, 5 De G., M. & G. 188; *Potter v. Baker*, 15 Beav. 489.

"Where the intention to create a perpetual annuity is found, a perpetual annuity will be held to have been created. *Mansergh v. Campbell*, 3 De G. & J. 232, 60 Eng. Ch. 232; *In re Morgan* 1893, 3 Ch. D. 222, 229, 60 Eng. Ch. 129; *Stokes v. Heron*, 12 Cl. & F. 161.

"It follows, therefore, both from the words of limitation of the annuities and from the express direction of the testator, that the annuities bequeated with the exception of several that are expressly limited for life, are perpetual annuities.

"By the terms of the will, the trust fund upon the termination of the trust, is to go to the annuitants entitled at the time of the termination in equal shares.

"This gift, if valid, constitutes an executory limitation on the prior gifts of annuities.

"Under the Rule against Perpetuities, a future interest, in order to be legally created, must be such that 'it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.'" Gray, 2d Ed. Secs. 201, 214 *et seq.*

"The Rule against Perpetuities must be taken to be in force in the Territory of Hawaii." Gray, Preface, Secs. 98, 200. R. L., Sec. 1.

32 "Here, then, to save the division clause from invalidity, it must appear that the trust to secure the payment of life and perpetual annuities, will necessarily terminate within the period of some life in being at the testator's death and twenty-one years thereafter.

"We have found that the trust in so far as the annuities are concerned, may continue forever. The only remaining beneficial interest under the trust is the surplus income. No express disposition being made of the surplus income, it, either, is undisposed of, or, follows the capital and must be accumulated. If the former, it is a vested interest belonging to the heirs of the testator, who may choose to permit the trust to continue as begun indefinitely or forever; if the latter, since the enjoyment thereof is conditional upon the termination of the trust, it is subject to the Rule against Perpetuities, and, to be valid, the termination of the trust must occur within the period defined by the Rule." Gray, Sec. 671.

"But we have found that the sole actual purpose of the testator in providing the trust was to secure the payment of annuities and this he directed should continue as long as legally possible.

"To hold an accumulation of surplus income directed, will necessitate one of two things:

"First: Since a trust for the payment of perpetual annuities need never terminate and it is only upon the termination of this trust that the division is directed to occur, therefore, in order to attribute an intention to the testator consistent with his actual intention of continuing the payment of annuities under the trust as long as legally possible, the intention to subject the surplus income to a possibly endless accumulation must be attributed to him. Or,

"Second: The entire trust must be limited, contrary to the testator's actual purpose, to some life in being and twenty-one years thereafter, a period shorter than a trust for the payment of such annuities as are here created might continue.

"The first would be to attribute an unreasonable intention to the testator and is unrequired by the authorities; the second, to defeat the testator's actual intention that the annuities should continue as long as legally possible, which we have found may be forever. Neither should be done.

"It follows that the surplus income is intestate.

"As the entire trust may then go on forever, its termination may occur beyond the limits fixed by the Rule against Perpetuities. The final division clause, depending for its consummation upon that event, therefore, violates the Rule against Perpetuities and accordingly is void.

"This leaves the trust for the payment of life and perpetual annuities as the only valid disposition made of the residuary estate; this must be dealt with as though the division clause had been omitted from the will." Gray, Sec. 247 *et seq.*

"What then are the specific rights in the residuary estate?

"Life annuitants are at the most entitled to have such an amount of the property upon which their annuities are charged as will be sufficient to secure with practical certainty the payment from its income of their annuities, set aside to secure the payment of their annuities. *Harbin v. Masterman,* 1896, 1 Ch. 351; *Healey v. Toppan,* 45 N. H. 243.

"A perpetual annuitant is entitled to the payment to him of an amount from the fund upon which his annuity is charged sufficient to produce the amount of his annuity in satisfaction thereof. *Potter v. Baker,* 15 Beav. 489; 51 Eng. Rep. (Full Repr.) 627; *Bent v. Cullen,* L. R. 6 Ch. App. 235; *Hill v. Rattey,* 2 J. & H. 634; 1 Mew's Eng. Case Law Dig. 239; *Hicks v. Ross,* L. R. 14 Eq. 141; *Huston v. Read,* 32 N. J. Eq. 591; *Bradhurst v. Bradhurst,* 1 Paige (N. Y.) 331.

33 "The measure of sufficiency for the purposes of an appropriation to secure the payment of life annuities should be first class trust investments; the measure of sufficiency of the amount necessary to extinguish a perpetual annuity should be the legal rate of interest. *Nash v. Cutler,* 19 Pick. (Mass.) 167; 2 Cyc. 467-468 note.

"The uniform rule of descent of real and personal property in the Territory of Hawaii eliminates, except as to the small portion of real estate in Ireland, any question of marshalling. It follows, therefore, that with the noted exception, the trustee is only entitled to receive from the executors such an amount of the personal assets as may be required in addition to the real estate already held by the trustee to make up the amount required to secure the annuities and extinguish such of them as are perpetual."

34 *Contention of the Trustee.*

"The Hawaiian Trust Company, Limited, trustee under the will of George Galbraith, contends that the trust provided for in the said will is wholly valid and that it is competent to act as trustee thereof; that the trustee takes the legal fee of the entire residue of the estate and that the beneficiaries named take the entire equitable interest in the trust fund, there being no intestacy either legal or quitable as to either principal *of* income; that the forty odd annuitants specifically named take annuities for their lives; that on the death of each annuitant other than the four 'who are to receive only their life annuities' his heirs take his annuity until final distribution; that the time for the termination of the trust and the final distribution of the trust fund is the expiration of twenty-one years after the death of the last survivor of the forty odd annuitants specifically named; that the trustee must keep the entire trust fund intact until the termination of the trust and the final distribution, and must accumulate the surplus income until that time and must then distribute the entire fund including the accumulated income to the persons entitled at that time to the annuities in proportion to the amounts of the annuities.

"The Trust Company believes that the foregoing construction of the will fully and accurately carries out the clear intention of the testator and that it does not conflict with any rule of law and that therefore in accordance with the fundamental principles of the construction of wills it should be adopted.

"The gift of the 'trust fund' at the termination of the trust is clearly a provision of the trust, that is a gift of an equitable rather than of a legal future interest.

"The provision is not a direct gift to certain persons, but a direction to the trustee to *divide* the fund *equally* among a large number of persons. This 'division' is to be made on the 'distribution' of the trust. Who is to perform this 'division,' this 'distribution,' the trustee or the law? How could the law do it? All that the law could do would be to make the recipients tenants in common of the fund leaving them to divide it among themselves. Surely the testator could not have intended to make this large number of persons tenants in common of a great mass of mingled real and personal estate. He does not leave them undivided interests, but expressly orders division. He must have wished the trustee to make the division. There is then an active duty of division and distribution imposed upon the trustee.

"The payment of the annuities was intended to continue 'for as long a period as legally possible' consistent with the validity of all the provisions of the trust and not merely as long as that first part of the trust by itself might last, leaving the second part illegal and void.

"What did the testator mean by 'said trust'? Did he not undoubtedly mean the entire trust including the gift of the corpus? The intention of the testator would be needlessly thwarted by adopting the artificial construction urged by our opponents.

"The trust provides for the accumulation of the surplus income up to the time of the final distribution, the accumulated income being carried by the final gift of the 'trust fund.' Such an accumulation is valid only for the same period as that allowed by the rule against perpetuities, to wit, lives in being and twenty-one years thereafter. The trust as an entirety, even aside from the gift of the corpus at the final distribution, cannot continue beyond lives in being and twenty-one years thereafter. The testator cannot reasonably be held to have intended that the trust should be mangled and that the accumulation of income and the payment of the annuities should stop at different times.

35 "Unless the clauses of limitation are applied to the provision as a gift of the accumulated income the gift will be invalid as too remote, the testator's plan for the accumulation will fail and there will be an intestacy as to the surplus income. The same clause covers the original capital fund as well as the accumulated surplus income and should be construed to have the same meaning and effect as to both.

As to the lives intended. "The lives of the forty odd annuitants are expressly mentioned in the will and are also eligible, that is in being at the testator's death. Indeed the testator expressly takes them as measuring the term, for his first gifts are life interests for those very lives. The annuities are to continue for those lives and as long as possible thereafter. The gifts of the annuities to the 'heirs' of the specifically named annuitants are clearly within the rule against perpetuities because they must take effect at the end of lives in being.

"Pownall *v.* Graham, 33 Beav. 242; Shelley *v.* Shelley, L. R. 6 Ec. Cases, 540, 547-8," followed "*In re* Johnston, L. R. 26 Ch. Div. 538, 546-8.

"The number of the annuitants is no objection to the selection of their lives. There is no limit to the number of lives which may be taken provided that it will be possible to find out by reasonable evidence when the last survivor dies.

"Gray's Rule Against Perpetuities, Sec. 217 to 218; 1 Tiffany on 'The Modern Law of Real Property,' Sec. 154 page 350; Thellusson *v.* Woodford, 11 Ves. Jr. 112, 134.

"It is therefore a question of construction whether there is an intestacy as to surplus income and so a resulting trust to the heirs and next of kin of the testator or whether that income is to be accumulated and is to pass under the final distribution. There is a strong presumption of law against partial intestacy. Revised Laws, Sec. 2531.

" 'There is a strong presumption against intestacy as to a portion of the estate.' Bertelman *v.* Kahilina, 14 Haw. 378, 382.

" 'The law prefers a construction which will prevent a partial intestacy to one that will permit it, if such a construction may reasonably be given.' Given *v.* Hilton, 95 U. S. 591, 594. See 30 Enc. of Law 668.

"The intention of the testator is clear. He gives all the residue of his estate to a trustee and directs the trustee to devote a part of the

income to paying certain annuities and then on the termination of the trust to divide up the trust fund. It is not as if there were no provision at all as to what should become of the surplus income.

"There is a very strong presumption that he intended to provide in the will for the distribution of this income. The question is then whether we can find in the will a sufficiently clear expression of that intention. We maintain that we can, that the gift of the 'trust fund' at the termination of the trust carries the accumulated surplus income. The testator does not refer back as he did once before to the 'aforesaid balance, residue or remainder of my estate,' that is the original capital, but he says 'trust fund,' that is the whole trust fund including whatever of capital or income it then contains.

"The testator says 'the balance, residue or remainder of my estate is to be placed in trust for as long a period as is legally possible.' Is not the natural meaning of that that the income is to go with the capital? That both capital and income, the entire residue, are to be held in trust as long as the law allows? Each item of income coming into the hands of the trustee comes in trust, by virtue of the trust in the will, and so necessarily becomes at once *ipso facto* part of the *trust fund.*

36 "As matter of law a future gift of a mixed fund of personalty and realty carries the intermediate income of the whole fund where there is no express gift of the income, and that there is an implied direction to accumulate the surplus income. Where there is merely a future gift of the corpus with nothing to indicate the intention of the testator as to the disposition of the intermediate income, so that it is merely a question of legal implication, of implied intent, a distinction has been drawn between realty and personalty. A future gift of personalty undoubtedly carries intermediate income, but the weight of authority holds that a future gift of realty does not carry the intermediate profits but that these go to the heir," but "when the future gift is of a mixed fund of realty and personalty it carries with it the intermediate income from the whole fund.

"Whenever any question as to the disposition of this mixed fund of realty and personalty or any part thereof, or the income therefrom, can be held to be a question of intention expressed or implied, the question should be decided the same way as to both realty and the personalty. The testator must have intended that the realty and the personalty of his mixed fund should go together. If he did not consciously so intend the law will imply the intent for him.

" 'When personal estate is given to A at twenty-one, that will carry the intermediate interest. If a testator gives his estate Blackacre at a future period that will not carry the intermediate rents and profits. But when a testator mixes up real and personal estate in the same clauses the question must be whether he does not show an intention that the same rule shall operate on both. * * * He does not by his will create any trust but makes a legal devise and bequest of the whole together; then is not the weight of authority in favor of the proposition that when real and personal estate are given in this way the intermediate profits of both must go together?

(*i. e.* should both be accumulated) I think it is.' Lord Eldon in Genery *v.* Fitzgerald, 1 Jac. 468.

"A testator gave the residue of his real and personal property to trustees to pay annuities and on the death of S. to convey to grandchildren, the surplus income being left undisposed of. The Court said:

" 'By the rule of the common law where there is a specific devise of a future estate and no disposition of the intermediate receipts and profits they go to the heir unless there is a residuary devise not future or contingent in which case they go to the residuary legatee. But a residuary bequest of personalty whether future or contingent carries the prior income and where real and personal estate are blended in one residuary gift the rule as to personalty governs. The same rules are applicable to trusts.' Cochrane *v.* Schell, 140 N. Y. 516, 537.

" 'If you find in one and the same clause in a will a gift of realty and personalty to go together to the same objects, then the rule is, that, if there are intermediate rents of the realty and intermediate income of the personalty which are not expressly disposed of, the rule with regard to personalty is followed, and the rents of the real estate must be accumulated in the same way as the income of the personal estate so as to go to the person who ultimately becomes entitled to the two funds.' *In re* Dumble, L. R. 23 Ch. Div. 360, 368.

" 'There is no principle better settled than that a general residuary bequest of personal property, contingent in terms, carries the intermediate income or interest, and that such income or interest will be required to accumulate and form part of the residue for the benefit of the part- that may be ultimately entitled to such residue. This is the settled doctrine upon all the authorities. * * * That being the rule in regard to executory bequests of residue of personal
37 estate, the rule is equally well settled that a blended gift or devise of a residuary real and personal estate, though contingent in terms, carries the intermediate rents and profits of the real estate, as well as the income of the personal estate. This has been regarded as the established rule ever since the leading case of Stephens *vs.* Stephens and the subsequent case of Gibson *vs.* Lord Montfort.' Hurtford *v.* Haines, 9 Atl. Rep. 540 (Md.)

"A testator gave 'all the residue of my real and personal property' to a trustee to pay an annuity and at a certain time to convey 'all my estate real and personal in the hands of my trustee aforesaid.' The surplus income was undisposed of. The Court treated the trust as including an implied direction to accumulate all the surplus income.' Eberly's Appeal, 110 Penn. St. 95; See also Wagstaffe *v.* Lowerre, 23 Barb. 209.

"The Hawaiian Trust Company, Limited, can act as trustee under the Will. Modern common law is clear that corporations can act as trustees if the purposes of the trust are 'Germane to the objects of the incorporation.'

"1 Clark & Marshall on Private Corporations, 150; Vidal *v.* Girard, 2 How. 127, 187.

"One of the principal purposes of the incorporation of the

Hawaiian Trust Company, Limited was to act as trustee in such cases as that of the Galbraith will. The fourth paragraph of the Articles of Association reads in part as follows:

" 'Third: That the purposes of the corporation are for doing such business and undertaking that it may in and by its corporate name take, receive and hold and repay, re-convey and dispose of any effects and property both real and personal, which may be granted, committed, transferred or conveyed to it, with its consent, upon any terms or upon any trust or trusts whatsoever at any time or times by any person or persons including married women or minors, body or bodies corporate or by any court; and to administer, fulfill and discharge the duties of such trust or trusts for such remuneration as may be agreed upon.'

"Any possible doubt there might have been on this question is removed by Act 69 of the Session Laws of 1905 which expressly gives the power in question.

" 'Section 4. Every Trust Company shall have power, in addition to the general powers conferred by law upon corporations and joint stock companies: (1) To take, receive and hold, and repay, reconvey and dispose of any effects and property, both real and personal, which may be granted, devised, bequeathed, committed, transferred or conveyed to it, upon any trust or trusts whatsoever, at any time or times by any person or persons, including married women and minors, body or bodies corporate, or by any State, Territorial, Federal or Foreign Court or Judge, and to administer, fulfill and discharge the duties of such trust or trusts for such remuneration as may be agreed upon or provided by law, or that may be provided by law.' Act 69, Session Laws 1905.

"Moreover when property is devised to a corporation on a valid trust the state in its sovereign capacity alone has the right to inquire into the competency of the corporation to act as trustee. Vidal *v.* Girard, 2 How. 127, 191; See Girard *v.* Philadelphia, 7 Wall 1, 14."

38 *Opinion of the Court, by Hartwell, J.*

The rule against perpetuities is law in Hawaii, being a rule of the English common law which is declared in the Judiciary Act of 1892 (R. L., Sec. 1) to be in force here. By that rule the direction in Galbraith's will for a division of the trust fund is invalid unless by the provisions of the will the division must be made by the end of lives in being and 21 years thereafter. If the will, when construed with reference to all its provisions, requires perpetual annuities to be paid out of the income then the fund which is placed in trust for supplying the income cannot be divided and the direction is futile for dividing the fund at a time which might never arrive and, at all events, would be too remote under the rule. Unquestionably a trust can be created for payment from the income of a trust fund of annuities to certain persons for life and either to their heirs forever or for a term of 21 years after the death of the last surviving annuitant and providing in the latter case for di-

vision of the trust fund and accumulated income among the heirs at the termination of the trust. Now if the testator had meant that a division be made at the time required by law, and placed the residue in trust for that purpose, as well as to provide for the annuities, but did not know how long the trust would continue, meaning by "trust" not only the payment of the annuities but the division of the trust fund, might he not well have said that the residue should "be placed in trust for as long a period as is legally possible," and that "the ending of said trust should take place when the law requires it," meaning that the fund should be divided then, or, as the will reads, "on the final ending and distribution of the trust?"

On the other hand, if he meant, as contended by the executors, to make perpetual annuities and to provide for a division of the trust fund only if and when the law should interfere and put an end to them, would he not naturally have made some direction for
39 disposing of income which he must have foreseen might not be used for the annuities? If he meant that the annuities should continue to be paid as long as was legally possible what occasion was there to say that their payment should end when the law required? Does he not mean to include in the trust which is to be concluded then, something more than payment of annuities, namely, distribution of the fund? There is no reason to infer from his language that he thought that the residue might legally remain forever undisposed of or that he wished such result if it was legally possible.

"Questions of this nature, like all other questions arising upon wills, depend upon the intention of the testator, to be collected from the words of the will, not, of course, as I understand the law, in the sense that the Courts are to be governed by the strict literal interpretation of the words, but in the sense that they are to gather from the words the intention of the testator, and to gather it not by speculation or conjecture as to what the testator may have intended, but by a sound and reasonable construction of the words which he has used. In determining the question before us we must therefore, in the first place, carefully examine the dispositions of this will." Hedges *v.* Harpur, 3 De G. & Jones, 134.

"The first thing to be looked for is the intention of the testator, and that is to be collected from the tenor of the instrument—the motive, if any, disclosed—the object sought to be obtained—and all the circumstances that appear to have been in the knowledge and mind of the testator. Even the use of artistic words, if used inartistically, in an inartistic instrument, will not necessarily control the intention otherwise manifested." Sackville West *v.* Holmesdale, 4 Eng. & Ir. Ap. Cas. 570.

"Moreover, it is against the settled rules of construction to strike out any words from a will because they offend against the perpetuity rule. For all purposes of construction, the will must be read as if no such rule existed. Any dispositions which, so reading and construing it, are found to be the testator's wishes must be taken to be his wishes, and if those wishes offend against the rule, the gifts would fail, and must fail accordingly; but they are not the less

part of his will, and to be resorted to as a part of the context for all purposes of construction, as if no such rule had been established." Heasman *v.* Pearse, L. R. 7 Ch. Ap. Cas. 283.

To these established rules it may be added that in arriving at the testator's intention provisions are not to be disregarded merely because they lead to unforeseen results unless such results would be plainly subversive of the clearly expressed objects of the testator, in which case, if the words are fairly susceptible of a meaning which is consistent with those objects, that meaning ought to be preferred.

40 The will clearly expresses the testator's twofold purpose that the the residue of his estate, after payment out of its income of certain annuities, should be distributed among those entitled to the annuities at the time of the distribution. There is nothing in the will to justify the inference that he meant that annuities should be payable to heirs indefinitely or forever or that "the said trust," the end of which was to "take place when the law requires it," included merely the payment of annuities. The trust was intended to accomplish the twofold purpose of payment of annuities and distribution of the trust fund coincident with the end of the trust.

The word "trust" is used in the will with different meanings, the direction that the residue is "to be placed in trust" meaning that the residue is given to the trustee afterwards appointed; the words "to be placed in trust for as long a period as is legally possible" meaning that the residue is given to the trustee to hold in trust for that period; the direction "the termination or ending of said trust to take place when the law requires it under the statute" meaning that the trustee's holding is then to terminate and the performance of its duties end. If the trust fund is to be divided by the trustee when he ceases to pay annuities the law fixes the time when the division must be made of him. A trust to pay annuities as long as the law allows and then to divide the estate limits the time of the division if the words mean "as long as the law allows consistently with a division." This meaning would affect the testator's purpose that his property be divided while any other meaning which has been suggested would defeat that purpose and would either leave the estate to go to the heirs at once, or else subject to the annuities for life only if not also subject to perpetual annuities, the value of which could now be determined and paid over. In order to attach to the testator's language a meaning which would bring any of these unintended results it would be necessary

41 to infer that he thought that there was some law which would terminate the annuity payments. While he had, as many persons have, a hazy notion about the duration of a trust, and may have thought it was to the trust instead of the gift over that a limit of time is made by the law, there is less reason for supposing that he was all wrong about this matter than for thinking that he meant to bring all his directions within the operation of the trust which he provided.

We construe the will then to mean that the residue was to be

placed and held in trust as long as should be legally possible prior to its distribution and that the annuities should cease and the distribution be made ending the trust at the time required by law. There are many reasons for this construction in addition to those above mentioned. The expression "trust fund" implies that not merely the residue is intended to be divided but also the unapplied income accumulated at the time of the division. In Draper *v.* Palmer, 1 N. Y. Supp. 120, the same words, when used in a trust deed, were held to be "intended to embrace not only the original property included in the trust, but any subsequent property that might have been added thereto, including also the accumulations." In Olivat *v.* Wright, L. R. 1 Ch. Div. 346 (1875), a devise was made to a husband for life "and after his decease to be divided amongst my five children;" upon any of the children dying without issue the share of such deceased child was to be divided equally among the surviving children. Per James, L. J., "Can there be any doubt that after his decease' means the time when the estate for life comes to an end and when the property is to be divided? * * * According to the plain and natural meaning of the words this can only mean that immediately after his decease the executors and trustees are to see that her property is actually divided among her five children. * * * Any other construction would lead to so many absurdities and contradictions that I cannot bring myself to entertain any doubt whatever as to what the intention of the testatrix was."

42 As a matter, not of law only, but of presumed intention, undoubtedly the income of a gift of mixed real and personal property would go to the donee. It is urged that, since by Hawaiian statute the heirs of the realty who at common law would receive the income in such cases, if not otherwise disposed of, are the same as the distributees of the personal property of intestate estates, this court is at liberty to say that the income of the trust fund in this case, so far as not required for the annuities, would go to the heirs. This view would require the unused income of each year, varying, of course, as it might do from year to year, to be paid to the heirs. And we are asked to order that a sufficient sum be set aside to produce, on reasonable estimate, the income required for payment of the annuities and to direct that the residue of the trust fund be taken by the heirs as intestate property. The objections to this course appear to us to be insuperable. The entire residue is placed in trust for the purposes named by the testator and for an ultimate division, not merely of the residue, but of the trust fund, among the heirs of certain of the annuitants. The fact that at present so large a part of the income is not required for the annuities would naturally have led the testator, if he had wanted the surplus to be taken out of the trust fund and used for any other purpose, to have made his directions accordingly. There appears to us to be a clearly implied trust then to allow the income to accumulate, but the accumulation of the income can continue no longer than the rule against perpetuities allows the postponement of the vesting of a gift of any other property.

We do not sustain the contention, which is strongly urged on behalf of the heirs, that there is uncertainty as to the lives *in esse* during which the final distribution of the trust property is to be held in abeyance. The courts have once held that a fee could be made to take effect upon the death of the life tenant and
43 then when a child of the life tenant should become of the age of legal majority so as to be able to dispose of the fee, went on to hold, as is shown by the history of the development of the rule against perpetuities, that the fee could remain in abeyance during any number of lives *in esse* and that they might as well be lives of persons having no interest in the property, and, finally, that the vesting of the property might be postponed for a term of 21 years afterwards. In this case the lives clearly intended are those of the annuitants mentioned.

Concerning the right of the Hawaiian Trust Company to take as trustee, as held in the matter of the will of Stephen Girard, Vidal *et al. v.* Girard's Executors, 2 How. 126, "Neither the heirs nor any other private person could have any right to inquire into or contest the right of the corporation to take the property or to execute the trust." The statute, R. L., Sec. 2535, authorizes the incorporation of joint stock companies "for the purpose of carrying on any business or undertaking, either mercantile, agricultural or manufacturing," or a real estate business, "or otherwise, for which individuals may lawfully associate themselves (excepting banking and professional business)." This court held in Hackfeld *v.* King, 11 Haw. 5, that articles of association could properly include not only agricultural, manufacturing and mercantile pursuits but "the doing of all things and the transaction of all business that may be lawfully done in connection with the purposes aforesaid or any one of them," and said, "The businesses or undertakings which are forbidden by this statute and which the minister may reject are those for which it would be unlawful for individuals to associate themselves, and banking and professional business." This would certainly authorize the incorporation of the Hawaiian Trust Company for the purpose of doing a trust business mentioned in its articles of association. We do not think that it would be proper now to adopt a different view of the statute.

44 We have thus answered in substance all the questions submitted which can now be settled. Whether the trust fund is to go to the heirs of the annuitants proportionately, meaning that the representatives of each annuity take the share of the fund determined by the ratio between the annuity and the aggregate sum of the annuities, or equally without regard to such ratio, are questions which cannot be adjudicated now.

There is and can be no controversy suggested between the heirs and next of kin of the sister Eliza, recently deceased, as they are the same persons. Under the decision in Thurston *v.* Allen, 8 Haw. 392, we have no occasion to consider the effect of the rule in Shelley's case if applied to the annuities payable to persons named and their heirs.

In reaching the foregoing conclusions we have received great as-

sistance from the admirably clear and thorough presentation of the case which the attorneys of these parties have made. All the cases cited have been examined carefully although with few exceptions we have not thought it necessary to refer in our opinion to those which support the results we have reached nor to express, further than we have done, our reasons for declining to accept, as applicable to the facts of this case, the cases cited in support of opposite conclusions. We append to a statement of the case a full summary made by the parties of their contentions on the points herein decided.

A decree may be prepared conforming to our opinion above expressed.

(Signed) W. F. FREAR.
(Signed) ALFRED S. HARTWELL.
(Signed) A. A. WILDER.

Holmes & Stanley for the heirs.
Smith & Lewis and C. H. Olson for the executors.
Ballou & Marx and R. B. Anderson for the Hawaiian Trust Company.

Endorsed: Supreme Court Territory of Hawaii. October Term, 1906. Hannah Fitchie, *et al. v.* Cecil Brown, *et al.* Opinion. Filed November 1, 1906, at 10:5- A. M. J. A. Thompson, Clerk.

45 In the Supreme Court of the Territory of Hawaii.

HANNAH FITCHIE, BARRY FITCHIE; HANNAH FITCHIE and BARRY FITCHIE, Executors under the Will of Eliza Fitchie, Deceased, ELIZA FRENCH, JOHN GALBRAITH, WILLIAM GALBRAITH, SAMUEL GALBRAITH, MARTHA CULLY, MARGARET JANE ROME, and HUGH GALBRAITH,

vs.

CECIL BROWN and W. O. SMITH, Executors under the Will of George Galbraith, Deceased, and HAWAIIAN TRUST COMPANY, LIMITED.

Submission on Agreed Statement of Facts.

Decree.

The above entitled cause having come before this court upon submission on agreed statement of facts, in accordance with Revised Laws, Section 1748, and counsel having been heard for the executors under the will of George Galbraith, deceased, for the Hawaiian Trust Company, Limited, and for the heirs at law of said George Galbraith, deceased, and the court having arrived at the conclusions announced in its opinion filed this day:

Now therefore

It is declared that the will of George Galbraith, deceased, established a valid trust and that the Hawaiian Trust Company, Limited

a corporation, the trustee named in said will is legally authorized to administer said trust.

It is further ordered adjudged and decreed that the Executors of the will after payment of debts, legacies, costs and counsel fees in the present proceeding of $2500 to counsel for the trustee, $2500 to counsel for the heirs and $1500 to counsel for the executors, and upon approval of their final accounts, deliver to the Hawaiian Trust Company, Limited, all the residue of the estate of said George Galbraith.

46 It is further adjudged and declared that a valid trust is established for the payment out of income of the trust property of the annuities payable by the provisions of the will to the four persons therein named for their respective lives and for the payment of the other annuities payable by the will to the other annuitants therein named for and during their respective lives and thereafter to pay the same to their heirs respectively until the end of twenty-one years after the death of the last survivor of all of the said annuitants, and during the same period of time to pay to the Kona Orphanage the annuity directed in the will and at the end of said twenty-one years to divide the trust fund and its accumulated and unapplied income as required by the direction in that behalf contained in the will.

By the Court:

(Signed) J. A. THOMPSON, *Clerk.*

Honolulu, T. H., November 3, 1906.

Endorsed: Supreme Court Territory of Hawaii. Hannah Fitchie, *et al. v.* Cecil Brown, *et al.* Decree. Filed November 3, 1906. J. A. Thompson, Clerk.

47 In the Supreme Court of the Territory of Hawaii.

HANNAH FITCHIE, BARRY FITCHIE; HANNAH FITCHIE and BARRY FITCHIE, Executors under the Will of Eliza Fitchie, Deceased, ELIZA FRENCH, JOHN GALBRAITH, WILLIAM GALBRAITH, SAMUEL GALBRAITH, MARTHA CULLY, MARGARET JANE ROME, and HUGH GALBRAITH,

v.

CECIL BROWN and WILLIAM O. SMITH, Executors under the Will of George Galbraith, Deceased, and HAWAIIAN TRUST COMPANY, LIMITED.

Assignment of Errors.

The above named Hannah Fitchie, Barry Fitchie, Hannah Fitchie and Barry Fitchie, Executors under the Will of Eliza Fitchie, deceased, Eliza French, John Galbraith, William Galbraith, Samuel Galbraith, Martha Cully, Margaret Jane Rome and Hugh Galbraith, pray an appeal from the final decree in this cause to the Supreme Court of the United States, and assign for error:

First. That the Court erred in adjudging that the Will of George Galbraith, deceased, established a valid trust;

Second. That the Court erred in ordering, adjudging and decreeing that the Executors of the said Will, after the payment of debts, legacies, costs and counsel fees allowed by the Court, and upon approval of their final accounts, deliver to the Hawaiian Trust Company, Limited, the trustee named in the said Will, all the residue of the estate of said George Galbraith;

Third. That the Court erred in adjudging and declaring that a valid trust is established by said Will for the payment out of
48 income of the trust property of the annuities payable by the provisions of the said Will to the persons therein specifically named for their respective lives;

Fourth. That the Court erred in adjudging and declaring that a valid trust is established by said Will for the payment out of income of the trust property of annuities to the heirs respectively of the persons specifically named as annuitants in said Will, other than Hugh Galbraith, Josie Fink, Emma Douglass and Matilda Bailey, after the respective deaths of said persons specifically named as annuitants, other than said Hugh Galbraith, Josie Fink, Emma Douglass and Matilda Bailey, and until the end of a period of twenty-one years after the death of the last survivor of all the persons specifically named as annuitants in said Will;

Fifth. That the Court erred in adjudging and declaring that a valid trust is established by the said Will for the payment out of income of the trust property of the annuity payable by the provisions of the said Will to the Kona Orphanage until the end of twenty-one years after the death of the last survivor of all the other annuitants specifically named in said Will;

Sixth. That the Court erred in adjudging and declaring that a valid trust is established by the said Will for the division of the trust fund among the persons who, by the terms of said Will, shall be entitled to the annuities bequeathed by said Will at the end of twenty-one years after the death of the last survivor of all the persons specifically named as annuitants in said Will;

Seventh. That the Court erred in adjudging and declaring that a valid trust is established by the said Will for the division of
49 the accumulated and unapplied income of the trust fund among the persons who, by the terms of said Will, shall be entitled to the annuities bequeathed by said Will at the end of twenty-one years after the death of the last survivor of all the persons specifically named as annuitants in said Will;

Eighth. That the Court erred in not adjudging that no valid trust was established under the residuary device of the said Will;

Ninth. That the Court erred in not adjudging and declaring that the provisions of the said Will for the payment of annuities are invalid;

Tenth. That the Court erred in not adjudging and declaring that the provision of the said Will for the payment of annuities to the persons and institution specifically named in said Will is invalid;

Eleventh. That the Court erred in not adjudging and declaring

that the provision of the said Will for the payment of annuities to the heirs of the persons, other than Hugh Galbraith Josie Fink, Emma Douglass and Matilda Bailey, specifically named in said will as annuitants, is invalid;

Twelfth. That the Court erred in not adjudging and declaring that the provision of the said Will for the division of the trust fund among the persons entitled to the annuities provided by the terms of said Will at the time of the final ending and distribution of the trust provided by the terms of said Will, is invalid;

Thirteenth. That the Court erred in not adjudging and declaring that there is an intestacy of the surplus income, remaining annually after the payment of the annuities validly created by the said Will, if any:

Wherefore, the said parties praying this appeal pray that the said decree may be reversed and that they may have an adjudication and decree in their favor, as herein specified.

Dated this 2nd day of March, A. D. 1907.

(Signed) HOLMES & STANLEY,

(Signed) A. G. M. ROBERTSON,

Attorneys for Hannah Fitchie, Barry Fitchie, Hannah Fitchie and Barry Fitchie, Executors under the Will of Eliza Fitchie, deceased, Eliza Fitchie, John Galbraith, Samuel Galbraith, Martha Cully, Margaret Jane Rome and Hugh Galbraith.

Endorsed: Supreme Court, Territory of Hawaii. Hannah Fitchie, *et al. v.* Cecil Brown, *et al.* Assignors of Errors. Filed March 2, 1907 at 11:45 o'clock A. M. J. A. Thompson, Clerk Supreme Court, Territory of Hawaii. Holmes & Stanley, Kaahumanu St., Honolulu, Attorneys for Appellants.

51 In the Supreme Court of the Territory of Hawaii.

HANNAH FITCHIE, BARRY FITCHIE; HANNAH FITCHIE and BARRY FITCHIE, Executors under the Will of Eliza Fitchie, Deceased, ELIZA FRENCH, JOHN GALBRAITH, WILLIAM GALBRAITH, SAMUEL GALBRAITH, MARTHA CULLY, MARGARET JANE ROME and HUGH GALBRAITH,

v.

CECIL BROWN and WILLIAM O. SMITH, Executors under the Will of George Galbraith, Deceased, and HAWAIIAN TRUST COMPANY, LIMITED.

Affidavit as to Amount Involved.

TERRITORY OF HAWAII, *County and Island of Oahu, ss:*

Cecil Brown, being first duly sworn, on his oath deposes and says: That he and William O. Smith are the Executors under the Will of George Galbraith, deceased, and as such, are parties to the above entitled cause; that, of the personal property of the estate of said George Galbraith, deceased, there remains in the hands of said Ex-

ecutors property of an aggregate value of more than One Hundred Thousand Dollars ($100,000.00) in United States Gold Coin, including therein cash on deposit in banks in a sum of over Twenty-five Thousand Dollars ($25,000.00); that the said George Galbraith owned at the time of his death real estate in the Territory of Hawaii of a value of more than One Hundred Thousand Dollars ($100,000.00) in United States gold coin, and that the said real estate is, at the present time, of a value of more than One Hundred Thousand Dollars ($100,000.00); that the said real estate is
52 now in the possession of the Hawaiian Trust Company, Limited, one of the parties to the above entitled cause, claiming the same as trustee under the residuary devise of said Will;

That all the property hereinbefore mentioned, including said amount of cash on deposit in banks, is involved in the above entitled cause;

That the amount involved in the above entitled cause, exclusive of costs, exceeds the value of Five Thousand Dollars ($5,000.00).

(Signed) CECIL BROWN.

Subscribed and sworn to before me this second day of March, A. D. 1907.

(Signed) H. C. CARTER,
Notary Public, First Judicial Circuit, Territory of Hawaii.
[SEAL.]

Endorsed: Supreme Court, Territory of Hawaii. Hannah Fitchie *et al. v.* Cecil Brown, *et al.* Affidavit as to Amount Involved. Filed March 2, 1907, at 11:45 o'clock A. M. J. A. Thompson, Clerk Supreme Court, Territory of Hawaii. Holmes & Stanley, Kaahumanu St., Hon. Attorneys for Appellants.

53 In the Supreme Court of the Territory of Hawaii.

HANNAH FITCHIE, BARRY FITCHIE; HANNAH FITCHIE and BARRY FITCHIE, Executors under the Will of Eliza Fitchie, Deceased, ELIZA FRENCH, JOHN GALBRAITH, WILLIAM GALBRAITH, SAMUEL GALBRAITH, MARTHA CULLY, MARGARET JANE ROME and HUGH GALBRAITH,

v.

CECIL BROWN and WILLIAM O. SMITH, Executors under the Will of George Galbraith, Deceased, and HAWAIIAN TRUST COMPANY, LIMITED.

Appeal Bond.

Know all men by these presents: That we, John Galbraith, of Wahiawa, Island of Oahu, Territory of Hawaii, as Principal, and Mark P. Robinson and Allen W. T. Bottomley, of Honolulu, said Island and Territory, as Sureties, are held and firmly bound unto Cecil Brown and William O. Smith, Executors under the Will of George Galbraith, deceased, of said Honolulu, and the Hawaiian

Trust Company, Limited, an Hawaiian corporation, in the full and just sum of Five Hundred Dollars ($500.00), to be paid to the said Cecil Brown and William O. Smith, Executors under the Will of George Galbraith, deceased, and the Hawaiian Trust Company, Limited, their certain attorneys, executors, administrators, successors or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this second day of March, A. D. in the Year of our Lord, One thousand nine hundred and seven.

Whereas, Hannah Fitchie, Barry Fitchie, Hannah Fitchie and Barry Fitchie, Executors under the Will of Eliza Fitchie, de-
54 ceased, Eliza French, William Galbraith, Samuel Galbraith, Martha Cully, Margaret Jane Rome, Hugh Galbraith and the said John Galbraith, parties to the above entitled cause, have obtained an appeal to the Supreme Court of the United States, to reverse the decree rendered in the above entitled cause by the Supreme Court of the Territory of Hawaii, and a citation directed to the said Cecil Brown and William O. Smith, Executors under the Will of George Galbraith, deceased, and the said Hawaiian Trust Company, Limited, citing and admonishing them to be and appear at a Supreme Court of the United States, at the City of Washington, within sixty days from the second day of March, A. D. 1907:

Now, therefore, the condition of the above obligation is such that if the said appellants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make said appeal good, then the above obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(Signed) JOHN GALBRAITH.
(Signed) MARK P. ROBINSON.
(Signed) ALLEN W. T. BOTTOMLEY.

Sealed and delivered in the presence of

(Signed) H. C. CARTER.
(Signed) W. L. STANLEY.

Approved by

(Signed) W. F. FREAR,
Chief Justice Supreme Court,
Territory of Hawaii.

Endorsed: Supreme Court, Territory of Hawaii. Hannah Fitchie, *et al. v.* Cecil Brown, *et al.* Appeal Bond. Filed March 2, 1907 at 11:45 o'clock A. M. J. A. Thompson, Clerk Supreme Court, Territory of Hawaii. Holmes & Stanley, Kaahumanu St., Honolulu. Attorneys for Appellants.

55 In the Supreme Court of the Territory of Hawaii.

HANNAH FITCHIE, BARRY FITCHIE; HANNAH FITCHIE and BARRY FITCHIE, Executors under the Will of Eliza Fitchie, Deceased; ELIZA FRENCH, JOHN GALBRAITH, WILLIAM GALBRAITH, SAMUEL GALBRAITH, MARTHA CULLY, MARGARET JANE ROME, and HUGH GALBRAITH

v.

CECIL BROWN and WILLIAM O. SMITH, Executors under the Will of George Galbraith, Deceased, and HAWAIIAN TRUST COMPANY, LIMITED.

Appeal.

The above named Hannah Fitchie, Barry Fitchie, Hannah Fitchie and Barry Fitchie, Executors under the Will of Eliza Fitchie, deceased, Eliza French, John Galbraith, William Galbraith, Samuel Galbraith, Martha Cully, Margaret Jane Rome and Hugh Galbraith, conceiving themselves aggrieved by the order and decree made and entered on the third day of November, 1906, in the above entitled cause, do hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and pray that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be
56 sent to the Supreme Court of the United States.

Dated this 2nd day of March 1907.

HOLMES & STANLEY,
A. G. M. ROBERTSON,
Attorneys for said Hannah Fitchie, Barry Fitchie; Hannah Fitchie and Barry Fitchie, Executors under the Will of Eliza Fitchie, Deceased; Eliza French, John Galbraith, William Galbraith, Samuel Galbraith, Martha Cully, Margaret Jane Rome and Hugh Galbraith.

The foregoing claim of appeal is allowed.
Dated this 2nd day of March, 1907.

[Seal Supreme Court, Territory of Hawaii.]

W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

57 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Cecil Brown and William O. Smith, Executors under the Will of George Galbraith, Deceased, and The Hawaiian Trust Company, Limited, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington, within sixty days from the date of this Writ, pursuant to an appeal, duly allowed by the Honorable Walter F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii, and filed in the Clerk's office of said Court on the 2nd day of March, A. D. 1907; in a cause wherein Hannah Fitchie and others are appellants, and you appellees, to show cause, if any, why the Decree rendered as in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Walter F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii, this 2nd day of
58 March, A. D. 1907.

[Seal Supreme Court, Territory of Hawaii.]

W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Service of a copy of the within appeal and citation is hereby admitted, this 2nd day of March, A. D. 1907.

BALLOU & MARX,
Attorneys for the Hawaiian Trust Company, Limited, Appellee.
SMITH & LEWIS AND
C. H. OLSON,
Attorneys for Cecil Brown and William O. Smith, Executors under the Will of George Galbraith, Deceased, Appellees.

58½ [Endorsed:] Supreme Court, Territory of Hawaii. Hannah Fitchie, *et al.*, *v.* Cecil Brown, *et al.*, Appeal and Citation. Filed March 2 1907, at 11:45 o'clock A. M. J. A. Thompson Clerk Supreme Court, Territory of Hawaii. Holmes & Stanley, Kaahumanu St., Honolulu, Attorneys for Appellants.

59 In the Supreme Court of the Territory of Hawaii.

HANNAH FITCHIE, BARRY FITCHIE; HANNAH FITCHIE and BARRY FITCHIE, Executors under the Will of Eliza Fitchie, Deceased; ELIZA FRENCH, JOHN GALBRAITH, WILLIAM GALBRAITH, SAMUEL GALBRAITH, MARTHA CULLY, MARGARET JANE ROME, and HUGH GALBRAITH, Appellants,

v.

CECIL BROWN and WILLIAM O. SMITH, Executors under the Will of George Galbraith, Deceased, and HAWAIIAN TRUST COMPANY, LIMITED, Appellees.

Submission of Agreed Statement of Facts.

Præcipe Designating Parts of Record to be Included in Transcript.

To Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii:

You are requested to make a transcript of the record in the Supreme Court of the Territory of Hawaii in the cause entitled "Hannah Fitchie, Barry Fitchie, Hannah Fitchie and Barry Fitchie, Executors under the Will of Eliza Fitchie, deceased, Eliza French, John Galbraith, William Galbraith, Samuel Galbraith, Martha Cully, Margaret Jane Rome and Hugh Galbraith *v.* Cecil Brown and William O. Smith, Executors under the Will of George Galbraith, deceased, and Hawaiian Trust Company, Limited," to be filed in the Supreme Court of the United States, pursuant to an appeal
60 taken and allowed in said cause, and to include in such transcript of record the following papers and Exhibits, to wit:

1. Submission on Agreed Statement of Facts;
2. Exhibit "A," Last Will and Testament and Codicil of George Galbraith, deceased;
3. Exhibit "B," Articles of Association of the Hawaiian Trust Company, Limited;
4. Exhibit "C," Certificate of Treasurer of the Territory of Hawaii;
5. Motion of Hugh Galbraith to be made party to Submission;
6. Opinion of the Supreme Court of the Territory of Hawaii;
7. Decree;
8. Assignment of Errors;
9. Affidavit of Amount Involved;
10. Appeal Bond.

Respectfully,

HOLMES & STANLEY,
A. G. M. ROBERTSON,
Attorneys for Appellants.

60½ [Endorsed:] In the Supreme Court of the Territory of Hawaii. Hannah Fitchie, *et al.*, appellants, *v.* Cecil Brown *et al.*, appellees. Præcipe Designating Parts of Record to Be Included in Transcript. March 7, 1907. Filed March 8 1907 at 9:45 o'clock A. M. J. A. Thompson Clerk Supreme Court. Holmes & Stanley Attorneys for Appellants Kaahumanu St., Honolulu, T. H.

61 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

HANNAH FITCHIE, BARRY FITCHIE; HANNAH FITCHIE and BARRY FITCHIE, Executors under the Will of Eliza Fitchie, Deceased; ELIZA FRENCH, JOHN GALBRAITH, WILLIAM GALBRAITH, SAMUEL GALBRAITH, MARTHA CULLY, MARGARET JANE ROME and HUGH GALBRAITH

vs.

CECIL BROWN and WILLIAM O. SMITH, Executors under the Will of George Galbraith, Deceased, and HAWAIIAN TRUST COMPANY, LIMITED.

Submission on Agreed Statement of Facts.

Certificate of Clerk to Transcript of Record.

TERRITORY OF HAWAII, *Honolulu, Oahu, ss:*

I, Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify that the foregoing pages numbered 1 to 54 inclusive, contain full, true and correct copies of the pleadings, record entries and decree in the above entitled cause in the Supreme Court of the Territory of Hawaii, and on proceedings on appeal in the Supreme Court of the United States as full, true and correct and complete as the same — on file and of record in my office as Clerk of said Supreme Court of the Territory of Hawaii in said cause, and herewith transmitted to the said Supreme Court of the United States in pursuance of the Praecipe of the attorneys for the appellants attached hereto.

I do further certify that the Original Appeal and Original Citation with the acknowledgments of service thereon are hereto attached and herewith returned.

62 In testimony whereof, I have hereunto set my hand and affixed the Seal of the Supreme Court of the Territory of Hawaii, this 8th day of March, A. D. 1907, at my office in Honolulu, in the Island of Oahu.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,
Clerk Supreme Court of the Territory of Hawaii.

Endorsed on cover: File No. 20,627. Hawaii Territory supreme court. Term No. 263. Hannah Fitchie, Barry Fitchie; Hannah Fitchie and Barry Fitchie, executors under the will of Eliza Fitchie, deceased, *et al.*, appellants, *vs.* Cecil Brown and William O Smith, executors under the will of George Galbraith, deceased, and The Hawaiian Trust Company, Limited. Filed March 22d, 1907. File No. 20,627.

FILED.
OCT 1 1908
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. ~~265~~ 47

HANNAH FITCHIE, BARRY FITCHIE, HANNAH FITCHIE AND BARRY FITCHIE, EXECUTORS UNDER THE WILL OF ELIZA FITCHIE, DECEASED; ELIZA FRENCH, JOHN GALBRAITH, WILLIAM GALBRAITH, SAMUEL GALBRAITH, MARTHA CULLY, MARGARET JANE ROME, AND HUGH GALBRAITH, APPELLANTS,

v.

CECIL BROWN AND WILLIAM O. SMITH, EXECUTORS UNDER THE WILL OF GEORGE GALBRAITH, DECEASED, AND HAWAIIAN TRUST COMPANY, LIMITED, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR THE APPELLANTS.

W. L. STANLEY,
HENRY HOLMES,
Attorneys for Plaintiffs.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 263.

HANNAH FITCHIE, BARRY FITCHIE, HANNAH FITCHIE AND BARRY FITCHIE, EXECUTORS UNDER THE WILL OF ELIZA FITCHIE, DECEASED; ELIZA FRENCH, JOHN GALBRAITH, WILLIAM GALBRAITH, SAMUEL GALBRAITH, MARTHA CULLY, MARGARET JANE ROME, AND HUGH GALBRAITH, APPELLANTS,

v.

CECIL BROWN AND WILLIAM O. SMITH, EXECUTORS UNDER THE WILL OF GEORGE GALBRAITH, DECEASED, AND HAWAIIAN TRUST COMPANY, LIMITED, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR THE APPELLANTS.

Statement of the Case.

This is an appeal from the decision and decree of the Supreme Court of the Territory of Hawaii, which decree is dated the third day of November, 1906. The parties hereto

filed in the Supreme Court of the Territory of Hawaii a submission of a case on an agreed statement of facts, in accordance with section 1748 of the Revised Laws of Hawaii; which section is as follows:

> "SEC. 1748. To Supreme Court; affidavit.—Parties to a question in difference which might be the subject of a civil action in the circuit court or Supreme Court may, without action, agree upon a case containing the facts upon which a controversy depends and present a submission of the same to the justices of the Supreme Court either in term time or in vacation; but it must appear by affidavit that the controversy is real and the proceedings in good faith to determine the rights of the parties; provided, however, that the justices of the Supreme Court may in their discretion require the case to be first submitted to a circuit judge at chambers, subject to appeal" (C. C. 1859, sec. 1140; Cp. L., sec. 1140; C. L., sec. 1255; Am. L. 1898, c. 18).

George Galbraith, late of Honolulu, deceased, died on the fifth day of November, 1904, domiciled in the Territory of Hawaii, leaving a last will and testament and codicil thereto both dated the twenty-first day of January, 1904, which were admitted to probate by the third judge of the Circuit Court of the First Judicial Circuit of the said Territory, sitting in chambers in probate, on the twenty-fourth day of March, 1905, and letters testamentary were granted to Cecil Brown and W. O. Smith, the executors named in the said will and two of the appellees. A copy of the will and codicil appear on pages 7-10 of the transcript of record.

The executors have paid the debts and funeral expenses of deceased and the pecuniary legacies of specific amounts bequeathed by the will, but no order of distribution by the probate court of the residuary personal estate in their hands has yet been made, such distribution awaiting the final decision of the case.

The testator, George Galbraith, left real and personal property both in the Territory of Hawaii and in Ireland.

The aggregate value of the personal property in the Territory of Hawaii remaining in the hands of the executors, after payment of debts of deceased and the before-mentioned legacies, was $121,114.54, and of the real property in the said Territory, $128,500.00. All of the real property in the said Territory, except only a small house lot, was, at the date of the death of testator, under lease for five years from September 17, 1900, at an annual rental of $10,600. The aggregate value of the personal property in Ireland so remaining was about $5,650.00, and of the real property, $3,915.00. The aggregate value of all of the said property, real and personal, both in the said Territory and in Ireland, amounts to $259,179.54, all of the said property being involved in this appeal.

The executors have possession of the residuary personal property, and the trustee has possession of the real estate in the said Territory.

The testator died never having been married, and his heirs-at-law, according to the law of the Territory of Hawaii, are the present appellants.

The will contains a residuary devise (R., p. 9) as follows:

> "The balance, residue or remainder of my estate is to be placed in trust for *as long a period as is legally possible*, the termination or ending of said trust to take place *when the law requires it under the statute*.
>
> "I hereby nominate and appoint the Hawaiian Trust Company, Limited, of Honolulu, Territory of Hawaii, as trustee of the aforesaid balance, residue or remainder of my estate and they are to devote sufficient of the annual income derived from the same toward paying the following annuities, which are to be free and clear of all taxes, unto the following persons mentioned, namely,
>
> | | | |
> |---|---|---|
> | "Sam Galbraith's children, aforementioned..... | $1,500 | yearly |
> | "Eliza Fitchie " ..... | 1,500 | " |
> | "Barry Fitchie's children, of Ballydrain, County Down, Ireland..... | 300 | " |
> | "Anne Jane Galbraith, aforementioned..... | 150 | " |

"Minnie Galbraith	aforementioned.....	$150	yearly
"Sarah Patton's children,	"	300	"
"John Galbraith's children,	"	500	"
"Kittie Johnson's two nieces,	" (each).	100	"
"Maud Fitchie	"	150	"
"Martha Dickinson	"	100	"
"Mamia	"	250	"
"J. Kailuli, alias Galbraith	"	250	"
"Robert William Cathcart's children	"	250	"
"Hugh Galbraith	"	300	"
"Hugh Galbraith's seven children	"	2,520	"
"Josie Fink aforementioned.....		150	"
"Emma Douglass "		150	"
"Matilda Bailey, Ballydrain, Co. Down, Ireland..		50	"

"All of the foregoing for life, and then to their heirs, save and excepted the last three persons, namely, Josie Fink, Emma Douglass and Matilda Bailey, who are to receive only their life annuities and at their death all their interest to cease.

"On the final ending and distribution of the trust, the trust fund to be divided equally amongst those persons entitled at that time to the aforementioned annuities."

The codicil (R., p. 10) modifies to some extent the terms of the residuary devise and is as follows:

"1st. Whereas, my nephew, Hugh Galbraith, of Wahiawa, Oahu, T. H., has been provided for by me in my last Will and Testament under paragraph number eighteen, I therefore revoke his participation in and to any of the bequests and benefits devised unto the children of the late Sam Galbraith. Furthermore the annuity devised to the aforesaid Hugh Galbraith and his heirs, I hereby revoke and substitute for it the following—To my nephew, Hugh Galbraith, of Wahiawa, Oahu, T. H., Three Hundred dollars ($300.) yearly, for life only.

"2nd. The annuity devised unto the seven children of the aforesaid Hugh Galbraith, I hereby revoke and substitute for it the following—To Hugh Galbraith's seven children, Twenty one hundred dollars ($2,100.) yearly, for life, and then to their heirs.

"3rd. I bequeath and devise unto the *Kona Orphanage*, of Kona, Hawaii, T. H., the sum of One Hundred dollars ($100.) yearly, under the same conditions as the other annuitants mentioned, save and excepted, Hugh Galbraith, Josie Fink, Emma Douglass, and Matilda Bailey."

There are "40 odd" annuitants named in the will and codicil, and the annuities aggregate $8,350.

By the case submitted, the Supreme Court of the said Territory was asked the following questions (R., pp. 5 and 6):

1. Is the trust as to the residue of the estate wholly invalid?
2. Is said trust wholly valid?
3. If said trust is wholly valid, when does it end?
4. If said trust is wholly valid, to whom and in what proportion is the trust fund payable upon the final ending of said trust?
5. If said trust is neither wholly valid nor wholly invalid, what part of it is valid?
6. Is there an intestacy as to any portion of the *corpus* of the residue of the testator's estate?

(*a*) Who are the heirs and next of kin of the testator and by what law are they to be determined?

(*b*) How is the intestate portion of the residue of the *corpus* and the amount thereof to be ascertained, and when and by whom can payment of such intestate portion be demanded?

7. Is there an intestacy as to the annual income remaining after payment of the annuities bequeathed by the will; and if so, to whom and in what proportion is said surplus income payable?
8. If there is not an intestacy as to the surplus income annually accruing, to whom and when does it become payable; and what are the duties of the trustee relative thereto?
9. What estates or rights do the annuitants specifically named (other than those "who are to receive only their life annuities") and their "heirs" respectively take under the trust?
10. Who are the "heirs" of the annuitants and by what law are they to be determined?

11. Are any or all of the annuitants under the trust entitled to claim appropriations from the *corpus* of the trust fund sufficient to produce their respective annuities, and the payment to them respectively of such appropriated portions?

(*a*) Upon what basis will the amount of the capital sum be calculated, and at what time or times can said annuitants so entitled, first demand such appropriations, and, second, call upon the trustee to transfer to them respectively the shares of the *corpus* so appropriated?

12. Can the Hawaiian Trust Company, Limited, act as trustee under the will?

The court below adjudged and declared in its decree (R., p. 34) "that a valid trust is established for the payment out of income of the trust property of the annuities payable by the provisions of the will to the four persons therein named for their respective lives and for the payment of the other annuities payable by the will to the other annuitants therein named for and during their respective lives, and thereafter to pay the same to their heirs respectively until the end of twenty-one years after the death of the last survivor of all of the said annuitants, and during the same period of time to pay to the Kona Orphanage the annuity directed in the will, and at the end of said twenty-one years to divide the trust fund and its accumulated and unapplied income as required by the direction in that behalf contained in the will."

From this decree this appeal is taken.

Specification of Errors.

(R., pp. 35 & 36.)

First. That the court erred in adjudging that the will of George Galbraith, deceased, established a valid trust.

Second. That the court erred in ordering, adjudging, and decreeing that the executors of the said will, after the pay-

ment of debts, legacies, costs, and counsel fees allowed by the court, and upon approval of their final accounts, deliver to the Hawaiian Trust Company, Limited, the trustee named in the said will, all the residue of the estate of said George Galbraith.

Third. That the Court erred in adjudging and declaring that a valid trust is established by said will for the payment out of income of the trust property of the annuities payable by the provisions of the said will to the persons therein specifically named for their respective lives.

Fourth. That the court erred in adjudging and declaring that a valid trust is established by said will for the payment, out of income of the trust property, of annuities to the heirs respectively of the persons specifically named as annuitants in said will, other than Hugh Galbraith, Josie Fink, Emma Douglass, and Matilda Bailey, and until the end of a period of twenty-one years after the death of the last survivor of all the persons specifically named as annuitants in said will.

Fifth. That the court erred in adjudging and declaring that a valid trust is established by the said will for the payment, out of income of the trust property, of the annuity payable by the provisions of the said will to the Kona Orphanage until the end of twenty-one years after the death of the last survivor of all the other annuitants specifically named in said will.

Sixth. That the court erred in adjudging and declaring that a valid trust is established by the said will for the division of the trust fund among the persons who, by the terms of said will, shall be entitled to the annuities bequeathed by said will at the end of twenty-one years after the death of the last survivor of all the persons specifically named as annuitants in said will.

Seventh. That the court erred in adjudging and declaring that a valid trust is established by the said will for the division of the accumulated and unapplied income of the trust fund among persons who, by the terms of said will, shall be entitled to the annuities bequeathed by said will at the end of twenty-one years after the death of the last survivor of all the persons specifically named as annuitants in said will.

Eighth. That the court erred in not adjudging that no valid trust was established under the residuary devise of the said will.

Ninth. That the court erred in not adjudging and declaring that the provisions of the said will for the payment of annuities are invalid.

Tenth. That the court erred in not adjudging and declaring that the provision of the said will for the payment of annuities to the persons and institutions specifically named in said will is invalid.

Eleventh. That the court erred in not adjudging and declaring that the provision of the said will for the payment of annuities to the heirs of the persons, other than Hugh Galbraith, Josie Fink, Emma Douglass, and Matilda Bailey, specifically named in said will as annuitants is invalid.

Twelfth. That the court erred in not adjudging and declaring that the provision of the said will for the division of the trust fund among the persons entitled to the annuities provided by the terms of said will at the time of the final ending and distribution of the trust provided by the terms of said will is invalid.

Thirteenth. That the court erred in not adjudging and declaring that there is an intestacy of the surplus income remaining annually after the payment of the annuities validly created by the said will, if any.

ARGUMENT.

We shall consider together the following questions:

1. Is the trust as to the residue of the estate wholly invalid?

2. Is said trust wholly valid?

3. If said trust is wholly valid, when does it end?

5. If said trust is neither wholly invalid nor wholly valid, what part of it is valid?

I.

First, we submit that the trust for final distribution ("on the final ending and distribution of the trust, the trust fund to be divided equally amongst those persons entitled at that time to the aforementioned annuities") is invalid because there is no direction in the will as to when it is to take place, *to which effect can be given*. Absolutely the only direction given by the will as to the duration of the trust is contained in the words: "The residue * * * to be placed in trust for *as long a period as is legally possible*, the termination or ending of said trust to take place *when the law requires it under the statute*." Unless there is contained in those words a direction as to the duration of the trust, or—to put it in another way—a direction as to the period at which that part of the trust which consists of the payment of annuities is to cease, and that part which consists of the distribution of the capital is to take place, then the duration of the trust has not been sufficiently declared by the testator and the trust is one which the court cannot carry out.

It is evident from the words quoted (*a*) that the testator wanted to tie up the capital as long as he legally could, or,

to use his words, "for as long a period as is legally possible," and (*b*) that he did not in fact know what limit of time the law imposed on such tying up. He probably had a vague idea, as many people have, that the law would not allow one to tie up property indefinitely, and, with a view to avoiding the penalty which might be incurred by an infraction of that law, he put in the phrase in question; but there is nothing whatever to show that he had any idea as to the length of postponement possible, or as to the very peculiar method of measurement which the law makes use of to decide whether a trust is void for perpetuity or not. It is a fallacy, we submit, to assume that the testator in fact knew anything about lives in being at his death being any part of the period during which a good trust might be extended, or to say that "the lives clearly intended are those of the annuitants mentioned" (R., p. 32), as the Supreme Court of Hawaii has done. Testator wished to provide annuities for some forty odd annuitants and their descendants, and he wished the provision of annuities and *only* annuities to continue as long as legally possible. He did not know how long it was legally possible; he did not know whether the period allowed by law would exceed the lifetime of all those original annuitants or of some only of them or none of them. He did not know whether the law would require a division while all the original annuitants were still alive, or immediately after all had died, or some time after all had died, and it is surely fallacious to say that he directed the annuities to continue for their lives and as long as possible thereafter. He directs the division to be made "amongst those persons entitled at that time to the aforementioned annuities," and this perfectly general description of the beneficiaries indicates that he was uncertain who they would be. If he had been certain that the original annuitants would be the beneficiaries, he would have directed the distribution to be made among *them;* if he had been certain that no distribution would be required by law till all the original annuitants were dead, he would have directed the

distribution to be made among their *descendants;* not being certain—indeed, not knowing anything of the time when the distribution must take place—he used a phrase which would cover either the original annuitants or their descendants, and in this way, as he thought, made certain of the destination of the *corpus*, no matter when a distribution had to be made. It is unlikely that he contemplated the possibility of some of the annuitants assigning their annuities. His object was to provide an annual sum for each of them, and it is very improbable that he used the expression "persons entitled at that time" to provide for the possibility of one of the annuitants disposing of his or her annuity to an outsider, *and to secure by his will that such outsider should get a share of the carefully guarded corpus.*

His object, then, being to tie up the *corpus* as long as possible, and to have it divided when the law required division, and not till then, the question is whether he has used words which enable the court to fix the time of division. The only words he has used are those quoted above—"for as long a period as is legally possible * * * the ending * * * to take place when the law requires it under the statute."

There is no "statute" in Hawaii imposing a time limit, as testator supposed, and the common-law rule against perpetuities is in force in Hawaii by virtue of section 5, chapter 57, Session Laws of Hawaii of 1892 (section 1 of the Revised Laws of Hawaii), which is as follows:

> "SEC. 1. Applies except when.—The Common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory of Hawaii, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage, provided, however, that no person shall be subject to criminal proceedings except as provided by the writ-

ten laws of the United States or of the Territory of Hawaii (L. 1892, c. 57, sec. 5; C. L., sec. 1109; Am. L. 1903, c. 32, sec. 2).

The will must therefore be interpreted according to the principles which have been laid down in cases decided under the English common law, and may be read as if, instead of these words of duration, the testator had used such words as "for as long a period as is allowed by the rule against perpetuities."

The question, then, really is whether when a testator has directed his property to be held in trust, and with respect to the duration of the trust has directed merely that it is to last as long as the rule against perpetuities will allow and the trust involves duties of two (inconsistent) kinds—(*a*) the payment of annuities out of the interest of the capital, (*b*) the division of the capital—the court can *by means of the will alone* decide at what period of time the payment of annuities is to cease and the division of the capital is to take place. If this period is not fixed by the will, then the persons to participate in the division of the capital cannot be ascertained, and to that extent, at any rate, the trust is uncertain, and therefore impossible to fulfill.

If the words "for as long as legally possible,"—"the termination or ending of said trust to take place when the law requires it under the statute"—had not been inserted in the will, the trust would have been (*a*) to pay life annuities to the named annuitants, (*b*) to pay perpetual annuities to their heirs, (*c*) to divide the capital among those entitled to the annuities, this last provision being void for remoteness.

It may be contended on behalf of the trustee, as it was in the court below, that the effect of the insertion of these words is to alter the disposition of the property, so that the payment of annuities will go on only during lives in being and twenty-one years, and therefore, by reason of this expression being inserted, the trust must be interpreted as

being (*a*) to pay life annuities to the named annuitants, (*b*) to pay annuities to their heirs during lives in being and twenty-one years, (*c*) then to divide the capital; and that the testator must be taken to have selected as the lives in being the lives of the named annuitants.

(A) Would the words in question have the effect of fixing the time for the termination of the annuities and the payment over of the *corpus* at the end of twenty-one years after lives in being?

(B) Whether, supposing that they had that effect, the testator can be taken to have selected the lives in question or any lives?

A.

The question as to what is the effect of inserting such words as these has been discussed in a great number of cases, and there has been a disinclination on the part of judges to lay down any general rule on the question. Among these cases are:

Shelley v. Shelley, L. R., 6 Eq., 540.
In re Johnston, L. R., 26 Ch. D., 538.
Sackville-West v. Viscount Holmesdale, L. R., 4 Eng. and Irish Appeal Cases, 543.
Harrington v. Harrington, L. R., 5 Eng. and Irish Appeal Cases, 87, 105-7.
Hill v. Hill, L. R. (1902), 1 Ch., 537, 807.
In re Moore, L. R. (1901), 1 Ch., 936.
In re Exmouth, L. R., 23 Ch. Div., 158.
Lord Scarsdale v. Curzon (1860) 1 J. and H., 40.
Davies v. Davies, 36 Ch. D., 359 (at 380, 387, 392).
Tollemache v. Earl of Coventry, 2 Cl. and Fin., 611.
Pownall v. Graham, 33 Beav., 242.

Most of these are what are called Heirloom cases—*i. e.*, cases in which trusts of chattels are prescribed *with reference to* trusts of real property—and many of them are cases of *executory* trusts, where the testator or settlor, without attempting to be his own draftsman, has merely indicated the subject-matter of the trust and the objects of his bounty, and has left it to the court to frame the proper limitations.

Galbraith's will does not dispose of *heirlooms;* it does not contain any such *referential* trust, nor does it contain any *executory* trust, because if anything is clear as to the effect of the words in question, it is that they do not in themselves make the trust executory.

1 *Perry on Trusts* (2d ed'n), par. 359.

Harrington v. Harrington, L. R., 5 Eng. and Irish Appeal Cases, 87, at p. 100 *et seq.*

Hill v. Hill (1902), 1 Ch., 807; Cozens-Hardy, L. J., 815.

There is absolutely no ground for saying that the trust is executory, and therefore the court will mold the limitations; and it is only by ignoring the fact that the above are cases of (1) referential trusts, (2) executory trusts, or (3) trusts in which the lives to be taken are *pointed out* by the testator, that they can be considered as having any bearing on the case before the court. What are the words in the Galbraith will that show the trust to be executory, that correspond with the words in *Shelley v. Shelley* (*ubi supra*, at p. 545) on which the court there seized to declare the trust executory? That all these cases are English is not surprising, when the subject-matter and the sole purpose of the trusts are considered. The policy of the law of Hawaii, where estates tail are illegal (12 Haw., 375), does not require this court actually to go beyond the cases decided in England where estates are entailed to support hereditary titles and rights.

Lord Hatherley in *Harrington v. Harrington, supra*, at page 100 of the report, in discussing the effect of the words,

asks the question whether the words "by themselves, by virtue of the phraseology of the limitations, imply that the will is to be read as if the testator had used that as a short expression to indicate the exact period to which he wished to confine the limitations, viz., to confine it to vesting within the ordinary prescribed limits," and declines to lay down any general rule on the subject, simply varying the form of the decree, which could be done in that case without deciding the point as to the effect of the words, as the earl was entitled to the property in any event.

Lord Westbury in the same case points out that in the case of a directing gift of *chattels*—heirlooms—upon trust to correspond with the limitations of real estate up to the limit allowed by the rule against perpetuity, it is settled that as soon as the *real estate* vests in a tenant in tail in possession the transmissibility of the personal estate ceases, *though the time allowed by the rule against perpetuities has not expired* (*vide Hill v. Hill*, L. R. (1902), 1 Ch. at 541). In *Hill v. Hill* it was contended that by virtue of the words chattels were carried on during lives in being and twenty-one years, or, at any rate, for twenty-one years after death of testator, but it was held that they vested *absolutely* in the first tenant in tail in possession (Vaughan Williams, L. J., at p. 811). In this case the effect *of Lord Scarsdale v. Curzon*, *Shelley v. Shelley*, *In re Exmouth*, and *Harrington v. Harrington*, *supra*, is summed up as being to show that the effect of an attempt to settle personalty along with a title, etc., and an entailed estate, with the addition of the words "as long as the rules of law or equity permit," is to give an *absolute* estate in the chattels to the first tenant in tail in possession—*i. e.*, the addition of the words does not make the trust executory nor carry it on to the *full limit* allowed by the rule against perpetuities.

In *In re Johnston*, *26 Ch. D.*, at 548—a case in which the trust was clearly executory—it was held that the omis-

sion of the words "as far as the rules of equity will permit" was immaterial.

It is clear, we submit, on the principles laid down above, that the words "for as long a period as is legally possible, the termination or ending of said trust to take place when the law requires it under the Statute," do not in themselves prevent the *corpus* from vesting absolutely for twenty-one years after lives in being nor fix such a period during which the payment of annuities must go on.

B.

But assuming that the insertion of the words did produce such an effect, has the testator selected the "lives in being"?

Such a selection must be made *by him*, because the period allowed by the rule against perpetuities is made up of two factors, one fixed by law—*i. e.*, twenty-one years—and therefore certain, the other depending on the choice and volition of the settler—*i. e.*, a life or lives in being—and therefore uncertain; the total period, therefore, allowed by the rule is not a fixed and certain period (as testator thought), but a variable period, longer or shorter, within very wide limits, according to the volition of the testator, and a reference to the rule as a standard of duration affords no guide, unless the testator has given means of making certain the variable part *by himself selecting the lives which are to be taken.*

Has the testator here selected the necessary lives? If not, he has not fixed any period of duration any more than if he had said "the trust is to last for twenty-one years and such other period as—within certain limits—I may fix on."

The language of the will—the direction that the trust should end "when the law requires it under the statute," which has no existence—shows testator was ignorant of the rule against perpetuities.

It seems to have been assumed by the Supreme Court of Hawaii that when the testator directed his estate to be placed in trust for as long as the law allowed, and assigned as the

duties of the trust (*a*) to devote sufficient of the income to pay annuities to some forty named annuitants for their lives, and then to their heirs (those annuitants being natural persons) and, "under the same conditions as the other annuitants mentioned save and excepted 'the four,' who are to receive only their life annuities and at their death all their interests to cease," to pay an annuity to the Kona Orphanage (an artificial person); and (*b*) to distribute the capital when the law required to the persons then entitled to the annuities—that *that* amounted to a selection by the testator of the named annuitants (omitting the Kona Orphanage) as the lives to be taken to measure the term. And yet, in the few words of its decision dealing with the question of uncertainty, that court admits that the lives to be taken "might as well be lives of persons having no interest in the property" (R., p. 32).

In the first place, what reason is there for supposing that testator did not select the Kona Orphanage? He scrupulously puts it on an equality with the most favored class of annuitants. Where has it been decided that the lives to be selected must be natural lives? But whether or not the Kona Orphanage was a legally admissible life, what words are there in the will which show that testator meant to include it or exclude it? Again, why assume that he selected *all* the natural lives? Why not one of the two classes into which the natural lives are divided? Any one of the lives and twenty-one years would constitute "as long a period as is legally possible," or any two of them and twenty-one years, or any possible combination of them and twenty-one years. In other words, the "legally possible" period during which the trust is to last might be any one of thousands of periods, all different and all equally possible in the eye of the law.

All these periods equally fulfilling the conditions of duration prescribed by the will, what data have we to decide which of all of them the testator selected? Assuming that "children" here means children living at Testator's death, and that all these forty-odd lives as the lives to be used as

part measure of the term are eligible lives, what is there in the will to show that testator selected *all* these lives for the purpose? There are no words in this will by which such an intention can even be inferred; and it must be remembered, in construing a will, that the object of the courts is to ascertain not the intention simply, but the *expressed* intention, of the testator—the meaning which the words of the will, properly interpreted, convey.

Hawkins on Wills, p. 1.

The court is directed to the language of Lords Halsbury and Watson in *Scale v. Rawlins*, L. R. (1892), App. Cas., 342, at 343. Is the court (to use Lord Watson's language, pp. 344, 345) "at liberty to speculate upon what the testator may have intended to do, or may have thought he had actually done"? Can it give effect to any intention which is not expressed or plainly implied *in the language of the will?* Can the court get over the difficulty in this case "by inserting in the instrument words which are not to be found there"? Even assuming that testator knew of the necessity of selecting lives, it is beyond doubt that he has not in so many words *named* the persons whose lives are to be taken as the part measure. If the lives of the forty-odd annuitants and twenty-one years after is not "as long a period as is legally possible" for the trust to continue, that period does not answer the words of the will.

Is there any necessary *presumption*, either (1) by force of the common law, or (2) on the terms of the will, as compared with other wills which have been the subject of judicial decision, that the lives of these named annuitants, or any and what lives, were selected by him?

So far as necessary presumption of law is concerned, there is no difficulty, because it is well settled, and is admitted on all sides here, that the persons whose lives are taken *need* not have any interest in the estate (*Lewis on Perpetuities*, chap. XIII, p. 167). There was no *obligation* on the testator

to select as the lives, beneficiaries under the will, and there is no *presumption at law* that he chose them rather than any others. It follows from this that the testator did not by directing the trust to continue as long as legally possible, insure that it should *necessarily* continue during the whole lifetime of any single one of the named annuitants. If the testator had selected a man who survived him by only one day, then the law would have allowed the payment of annuities to go on for twenty-one years and one day from the testator's death. The capital would then have to be divided, though every one of the named annuitants might still be alive, and in this event no one of the named annuitants would in fact get an annuity during his whole life under the trust, and no one of their heirs (who are "named" as recipients of annuities just as much as their ancestors) would come in for any part of their annuity.

What the testator really directed was that the whole trust should last for a period which might or might not at his volition last as long as the lives of the named annuitants, and which might in fact determine before the life of any one of them; and, having so directed, he failed to give any data from which we can deduce what his volition was.

II.

Let us consider *Pownall v. Graham* (33 Beav., 242), which was relied on by the trustee in the court below. When that case is closely examined it will be seen that the terms of the will are essentially different from those in question here; that no *general* rule of construction is laid down there, and that the court by its decision directly negatives any construction favorable to the contention of the trustee.

"Reference to other cases on other wills is useless unless such cases lay down some canon of construction" (A. L. Smith, L. J., in "*In re Morgan*," L. R. (1893), 3 Ch. Div., at p. 232).

In *Pownall v. Graham* there was a gift of real and per-

sonal property to trustees in trust to permit three of the testator's brothers to receive the income of certain shares during their lives, after their deaths in trust on the same terms for two other brothers, after their deaths on the same terms for two others and the shares of those dying to the survivor or survivors, and after the decease of all these, in trust to apply the whole net annual income to such of their children as stood in need of the same, "as the law in such cases admits," and that the said trustees assign over (after the law as mentioned aforesaid admits of no further division among such children) all the freehold and personal property *to the eldest son of B. one of the brothers.*

It was contended on behalf of the nephews and nieces that the lives selected were those of all the nephews and nieces living at the time of testator's death, and that therefore the twenty-one years ran from the death of the longest liver of these. In other words, they contended that the lives of all the *cestuis que trustent* were to be taken; but the court declined to accept this contention and held the lives in being to be taken were those of the persons to whom life estates were given.

The trust in that case was (*a*) a trust *to permit* certain persons to receive the income during their lives. This trust, it may be pointed out, was a bare trust; it imposed no duties on the trustees; but (*b*) after the decease of all these, there began an active trust—*viz.*, to apply the whole net annual income to children—and it is to *this* trust, or this part of the trust, *alone* that the words of duration "as the law in such cases admits," are applied; and this is put beyond a doubt by the repetition, "after the law as mentioned aforesaid admits of no further division *among such children*"—that is to say, the testator refers to the period allowed by law as the measure of duration, *not* of the *whole* trust, as in Galbraith's will, but of that part of it which followed certain life estates.

The scheme of the will, says the Master of the Rolls, is that estates are given to the brothers for life, and at the death of the survivor of them the net income is to be distributed

among a class to be then ascertained, and this *trust* (*i. e.*, the trust for distribution among this class, to be then ascertained) is to last as long as the law allows. He held that the testator had marked the starting point as at the decease of the last of the life tenants, and that twenty-one years was the length of time allowed by law for the active trust for distribution which then began. That is all that *Pownall v. Graham* decides; it does not lay down any general rule as applicable to all wills in which the duration of a trust is limited by reference to the legally permissible period. It decides merely that when a testator has imposed a trust, to continue in the first place for certain life estates, and in the *second* place for a *further* period, and has limited this *further* period by a reference to the time allowed by law for its continuance, the law allows this second part of the trust to last twenty-one years. But in Galbraith's will the period allowed by law is referred to as the measure of duration of the *whole* trust—not merely of that part of it following certain named life estates, but of the whole trust. The words which are intended to limit the duration stand at the head of the whole trust and are clearly intended to apply to the trust as a whole. The maximum duration of the whole trust being thus, as the testator thought, limited safely, he proceeds to further limit the period of enjoyment of certain persons or classes of persons to their lives (if the law so far permitted), and in the case of certain other classes of persons—*i. e.*, the heirs of the first taken—he uses words which would give an estate forever (if the law so far permitted). It is a mere coincidence that the period of life enjoyment which the testator imposed as a time limit in one of the subdivisions of the whole trust might have been, if he had so expressed it, and the lives are not too many, a part of the measure of duration adopted by the law to fix the time during which a trust may continue. I wish this trust, he says, to last as long as the law allows; within the period allowed, I wish A, B, and C to get annuities for their lives, if the law allows a trust to continue so

long; and if the trust may continue longer than their lives, I wish their heirs to get the annuities *ad infinitum* if the law allows a trust to continue so long. Some of the beneficiaries are to get life estates if possible—it might just as well have been estates for a limited period—*e. g.*, till they attained twenty-one—and the "life" of one of them, the Kona Orphanage, will never end; and some of them are to get estates forever if possible. What is there in the will to show that he selected the life estates (omitting the Kona Orphanage) as part of the measure of the duration of the trust rather than the estates forever?

Pownall v. Graham is distinguishable for a further reason. The will in that case provided for a final gift over of the trust estate to the eldest son of one of the testator's brothers. If, as the Master of the Rolls in his decision says, the trust was to last until the expiration of twenty-one years after the death of every life in being at the death of the testator, all of the children of his brothers would be dead and the expressed gift over would fail of taking effect. No child of any of the testator's brothers, capable of taking the ultimate gift, could be a life in being, because the ultimate gift could only take effect twenty-one years after the lives to be taken. A will, however, must be construed so as to give effect to every provision in it, and any construction that would not have that effect must be rejected. The court was compelled, therefore, to construe the words "as the law in such case admits," as meaning in that case the twenty-one years plus the life estates mentioned. In Galbraith's will the ultimate gift is to persons to be ascertained for the first time by the ownership of the annuities at the time when the final distribution is directed. That gift, if valid, can take effect as far as the objects thereof are concerned, consistently with the continuation of the intermediate trusts during the lives of all persons in being at the time of the testator's death and twenty-one years thereafter.

The court in this case is hence not compelled, as it was

in *Pownall v. Graham*, to construe the words in question as meaning any shorter period.

No other case than *Pownall v. Graham, supra*, was referred to by the trustee in the court below in support of this part of its contention, and we have been unable to find any case deciding that where a testator has directed a trust to continue as long as legally possible and the trustee is to devote sufficient of the income to pay annuities to certain of the beneficiaries for their lives, that amounts to a selection by the testator of the lives of certain of these annuitants as part of the measure of duration of the trust. We submit there is no such rule of construction, and that *the testator here has failed to select lives and has therefore failed to give any effective directions as to when the payment of annuities is to cease, and when the division of the capital is to take place.*

If this be so, then the trust for division of the capital among those persons entitled to the annuities at that time is void for perpetuity, clearly for uncertainty.

In re Moore, L. R. (1901), 1 Ch., 936:

In the above case, a testator bequeathed personal property in trust to apply the income in keeping in repair her brother's tomb in Africa "for the longest period allowed by law, that is to say, until the period of twenty-one years from the death of the last survivor of all persons who shall be living at her death." Joyce, J., held the legacy bad for uncertainty; and this decision meets with the approval of Professor Gray, who states: "Is not this the best ground on which to place such cases?"

Gray, On Rule Against Perpetuities (2d ed'n), Sec. 219.

We submit, the meaning of the expression "for as long a period as is legally possible"—the words used in the Galbraith will—is "until the period of twenty-one years from

the death of the last survivor of all persons who shall be living at" Galbraith's "death," to use the words of the will in "*In re Moore*" (*Pownall v. Graham, ubi supra*, p. 246).

If the decision in *In re Moore* is approved by this court, it should be decisive of this case.

We present in parallel columns the words in the two cases which state the periods the respective trusts were to continue:

Moore Will.	*Galbraith Will.*
"for the longest period allowed by law."	"for as long a period as is legally possible."

It is clear that the meaning conveyed by either set of words is the same as that conveyed by the other.

III.

If the court hold that Galbraith's will directs that the lives of all of the "forty odd" annuitants are to measure the lives in being, we submit the trust is still void for remoteness, because it will tend to a perpetuity, as the extinction of forty-odd lives is more than can be made out by reasonable evidence or without difficulty; or it may be almost, if not quite, impracticable to ascertain when forty-odd lives became extinguished.

> "When it is asserted that the rule permits the vesting to be postponed during as many lives *as can be stated*, it must be asserted with this qualification provided they are not more than will admit of making out by reasonable evidence at what time the survivor ceases to exist."
>
> *Thellusson v. Woodford*, 4 Ves., 290.

> "But it is asked, Shall lands be rendered unalienable during the lives of all the individuals who compose any large societies or bodies of men or where very extensive descriptions are made use of? It may

> be answered that when such cases occur they will, according to their respective circumstances, be put to the usual test, whether they will or will not tend to a perpetuity *by rendering it almost, if not quite, impracticable to ascertain the lives described and will be supported or avoided accordingly.*"
>
> *Thellusson v. Woodford*, 11 Ves., 136.

> "The language of all the cases is that property may be so limited as to make it unalienable during any number of lives not exceeding that to *which testimony can be applied to determine when the survivor of them drops.*"
>
> *Ibid.*, 146.

It is open to this court to say that more than forty lives (including seven classes of lives) are more than it will allow to be taken.

Gray (Rule against Perpetuities, Sec. 218) says:

> "It is quite possible that the whims of testators may some day compel the courts to lay down a rule limiting the number of lives which can be taken. At present there is no limit."

The common law is not "and has never been a fixed or rigid system." The rule against perpetuities was laid down by the courts. In holding that forty lives cannot be taken, the court would be merely taking the first step in the development or establishment of a new rule (in harmony with existing principles) to meet a new case.

IV.

Is a perpetual annuity devised to the "heirs" of the tenants for life except Josie Fink, Emma Douglass, Maltida Bailey, and Hugh Galbraith?

There are no words here that expressly create a perpetual annuity, such as the words "absolutely," or "forever," or "A and his heirs," would do. And "on the final ending

and distribution of the trust, the trust fund to be divided," etc., how could the annuities be payable longer than the duration of the trust—that is, beyond the time when the source from which they are payable is divided? And the fact that such source, or "the trust fund, (is) to be divided equally amongst those persons entitled at that time to the aforementioned annuities" makes this contention irresistible. The "persons entitled at that time to the aforementioned annuities" exchange their annuities for a share of the *corpus*. They are gainers, not losers, by the ending of the trust.

It seems perfectly clear that the intention of the testator was that no person should be entitled to touch the *capital* of the trust fund for so long a period as it was legally possible to tie it up, whatever the period might be; and that he did not anticipate that the direction for payment of these annual sums carried with it any rights in the capital of the trust fund. It is quite legal for a trust of *corpus* and a trust of income to exist quite independently of each other.

> *Cadell v. Palmer*, 21 Leading Eng. Cases, pp. 140-141; 1 Cl. and Fin., 372.

The question here is, whether the testator created such trusts in this case, and it seems clear that he has done so. But is not the effectiveness of the disposition of the income to the heirs dependent on the validity of the trust concerning the trust fund out of which it issues, the words of the will being: "The balance, residue or remainder of my estate is to be placed in trust for so long a period as is legally possible, the termination or ending of said trust to take place when the law requires it under the statute. I hereby nominate and appoint The Hawaiian Trust Company, Limited, of Honolulu, Territory of Hawaii, as trustee of the aforesaid balance, residue or remainder of my estate and they are to devote sufficient of the annual income derived from the same toward paying the following annuities." If the direction to hold for as long a period as is legally possible is

void for uncertainty, how can a trust to pay annuities for such a period be valid? If the annuities to the "heirs" are perpetual, they could invade the *corpus*, as we hereafter shall see, and what then becomes of the direction that the *corpus* is to be placed in trust for as long a period as is legally possible, and on the final ending of the trust the trust fund to be divided? There would only be a balance of a fund for disposition finally. The trust is created or the property is vested in The Hawaiian Trust Company, Limited, for the purpose of paying annuities. The same uncertain limitations fix the period during which these annuities are to be paid, and if the period for distribution is void for uncertainty, by the same reasoning the period during which these annuities are payable is uncertain and incapable of ascertainment, and therefore void.

If the trust or provision for distribution is held to be void, the court still has the right to refer to it in construing the remainder of the will. "The rule against perpetuities is not a rule of construction, but a peremptory command of law. It is not like a rule of construction, a test more or less artificial, to determine intention. Its object is to defeat intention. Therefore, every provision in a will * * * is to be construed as if the rule did not exist, and then to the provisions so construed the rule is to be remorselessly applied."

Gray, on Rule against Perpetuities (2d ed'n), 629, and Note 1.

"So a provision for remoteness is still to be resorted to for construing the rest of the will."

Heasman v. Pearse, L. R., 7 Ch. App., 275, 283.

If, therefore, the court holds the provision as to the division of the trust fund at the final ending of the trust void, in construing the trust as to the annuities, we submit, the court is not free to read the will as if it ended at the word "cease" in the last paragraph but one. The whole will must be read,

and even those parts that are void must be considered in ascertaining the meaning of those parts that are valid.

When some of the trusts in a will are legal and some illegal, if they are so connected together as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion was retained and other portions rejected, or if manifest injustice would result from such construction to the beneficiaries or some of them, then all the trusts must be construed together and must fall.

Tilden v. Green, 130 N. Y., 29, p. 50; 14 L. R. A., 33, p. 40.

The provision as to the division of the trust fund at the final ending of the trust measures the time when the payment of the annuities is to cease. It is difficult to see how these two provisions of the will can be separated without ignoring the words of the will.

Whether or not an annuity is perpetual is considered in—

In re Morgan, L. R. (1893), 3 Ch. Div., 222.

Blight v. Hartnoll, L. R., 19 Ch. Div., 294.

The annuities here are clearly only a charge on the fund, as they are payable out of the income and the testator expressly provides for the final distribution of the fund out of the income of which they are to be paid.

For the reasons given, we submit that perpetual annuities are not given to the "heirs" by the will of George Galbraith.

We submit that if any part of the trust of the residue is valid, it is the trust in favor of the life annuitants named. Here we have a gift of annuities to persons named for their lives. No uncertainty can be found there.

V.

6. Is there an intestacy as to any portion of the *corpus* of the residue of the testator's estate?

If the court hold the provision for the final distribution of the *corpus* invalid, and the remaining trusts valid, it follows that as to this *corpus* there is an intestacy, and consequently a resulting trust to the heirs and next of kin of testator.

6 (*a*). Who are the heirs and next of kin of the testator, and by what law are they to be determined?

In the Territory of Hawaii, there is no clear distinction between the terms "heirs-at-law" and "next of kin," if the latter term have any place in Hawaiian legal nomenclature; but in Ireland the distinction exists, the term "heirs-at-law" extending only to those who inherit real estate, while "next of kin" refers to those entitled to the personal estate of an intestate after payment of debts and costs of administration, not according to rules of descent, but under a statute of distribution. The heir-at-law of a person domiciled in Ireland is the eldest son, whilst his next of kin would comprise the same class designated by our word "heirs," so far as the personal property of deceased is concerned, although the personal estate is not distributed as in the Territory of Hawaii. Indeed, personal property of a married woman goes to her husband in case of her death intestate and not to her children, as in Hawaii. It is to be remembered that the estate of the testator consists of real and personal property in this Territory and real and personal property in Ireland, and that the annuities are charged on the whole estate.

It is submitted that the law of the domicil must prevail as to the property in the Territory of Hawaii and the personal property in Ireland. If this view is adopted, no difficulty

arises as to who are the heirs-at-law of deceased; they will be discovered by applying the rules of descent in force here.

> 6 (*b*). How is the intestate portion of the residue of the *corpus* and the amount thereof to be ascertained, and when and by whom can payment of such intestate portion be demanded?

Assuming that enough of the estate of the testator is set aside to provide for the annuities, there seems to be no reason why the portion of the estate not required should be withheld from the heirs-at-law longer than is necessary to determine to whom such portion is payable. If the provision for distribution is void, but the annuities held to be good, the whole estate, subject only to the annuities, or the whole estate save and except only sufficient thereof to provide for the annuities, belongs to the heirs-at-law as ascertained according to the law of descent of the property of intestates in force in the Territory of Hawaii, and should be paid to them forthwith.

Harbin v. Masterman, L. R. (1896), 1 Ch., 351, pp. 356 and 362.

VI.

> 7. Is there an intestacy as to the annual income remaining after payment of the annuities bequeathed by the will; and, if so, to whom and in what proportions is said surplus income payable?
>
> 8. If there is not an intestacy as to the surplus income annually accruing, to whom and when does it become payable; and what are the duties of the trustees relative thereto?

Assuming the court holds the trust good and fixes some period for its termination, the question will then arise as to what is to become of the surplus income. On the facts stated, it is clear that there will or ought to be a surplus of something like $10,000 a year. It is also clear that the

testator knew that he had not exhausted the income of his estate by the annuities bequeathed by his will, as he directs the trustees to devote *sufficient* of the *annual income* towards paying the annuities. It follows that there is either in effect a trust for the accumulation of the surplus income or there is an intestacy as to the surplus income.

Certainly the will contains no deliberate, clearly expressed intention to accumulate such as was clearly shown in the Thelluson case.

Here there is no trust or direction to accumulate, express or implied; nor does the will contain any indication of an intention on the part of the testator that the surplus income should be accumulated. He simply does not deal with the surplus at all; and if he has not done so, it is without the province of the court to insert such a trust or direction and thus make a will for the testator by construction.

The testator bequeaths certain pecuniary legacies to be paid; he then directs the trustee of the "balance, residue and remainder of his estate" to devote sufficient annual income *derived therefrom* towards payment of certain annuities.

Here the testator distinguishes most emphatically between the *corpus* and income. He says the trustee is to devote *sufficient* of the annual income to pay the annuities mentioned; but the will is absolutely silent, not a word, indeed, as to what is to become of the surplus income, although by the use of the word "sufficient" as well as by the facts the testator knew there would be a surplus. The facts show that at the time he made his will he had an annual rent reserved on a fifty-year lease of $10,000, besides other property to the value of $124,000, after paying the legacies bequeathed by the will; and by his will he disposes of *sufficient* of the income that this estate provided to pay annuities of $8,430 per annum. In face of these facts the testator makes no disposition of the surplus income. Further, while the will speaks from the death, it must be construed to ascertain his intention as at the time testator made the will. He himself dis-

tinguished between capital and income. The devise to the trustee is of his estate from which this income is to be produced. He then goes on to bequeath annuities out of the income so produced, but fails to exhaust the full amount of the income. Can it be said that a surplus income arising, say, a year after his death can be read into a bequest of capital moneys out of which the income arises to produce the surplus? Clearly not. We submit the "trust fund to be ultimately divided" means the original subject of the trust, with the execution of which the trustee is charged, and does not include the surplus income thereof.

The testator ought clearly to have directed the accumulation of any surplus income for ultimate distribution had he wished this to be done. He has not done so; therefore he must be taken to have died intestate as to the surplus income.

If there is an intestacy as to the *corpus* after providing for the annuities which will arise if the direction for final distribution is void, there is also an intestacy as to the surplus income, the destination of which will be decided by that of the *corpus*. No surplus income will therefore arise, as those who would be entitled to such surplus income as owners of the surplus capital will get the surplus capital paid over to them forthwith.

Assuming the court adopts this view, then on the authority of cases such as—

Hachin v. Mastermann, L. R. (1896), 1 Ch., 351;
Evans v. Walker, L. R., 3 Ch. Div., 211;
Bent v. Cullen, L. R., 6 Ch. App., 235,

it is clear that the court has authority to set apart a portion of the *corpus* sufficient to produce the annuities with certainty and to hand over the balance at once to the heirs-at-law and next of kin.

VII.

9. What estates or rights do the annuitants specifically named other than those "who are to receive only their life annuities," and their heirs, respectively take under the trust?

10. Who are the "heirs" of the annuitants, and by what law are they to be determined?

As the rule in Shelley's case is not in force in the Territory of Hawaii, the word "heirs" is a word of purchase, and the annuitants named can merely take life annuities.

The heirs of the annuitants will differ according to the nature of the property; thus the law of the domicile will apply in the case of the distribution of all movable property, wherever situate (2 *Wharton, Conflict of Laws* (3d ed'n), p. 1290), and "to the law of the State in which the land is situated we must look for the rules which govern its descent."

De Vaughn v. Hutchinson, 165 U. S., 566, 570.

11. Are any or all of the annuitants under the trust entitled to claim appropriations from the *corpus* of the trust fund sufficient to produce their respective annuities, and the payment to them respectively of such appropriated portions?

In the case of all of the annuitants the court has jurisdiction to set apart or appropriate sufficient of the estate to answer such annuities.

Harbin v. Masterman, L. R. (1896), 1 Ch., 351.

In case the court decides that the "heirs" are entitled to perpetual annuities, they will be entitled to have appropriated and paid to them on the death of the life annuitants such a sum as will be sufficient to produce their respective annuities.

Bent v. Cullen L. R., 6 Ch. ~~Div.~~, 235.

11 (*a*). Upon what basis will the amount of the capital sum be calculated, and at what time or times

can said annuitants so entitled, first, demand such appropriations, and, second, call upon the trustee to transfer to them respectively the shares of the *corpus* so appropriated?

We submit that the annuitants would be entitled to such a sum as would purchase investments proper for trust funds that would yield an income to the amount of the annuities.

The rule that an annuitant is entitled to the best security as an investment for the capital sum producing the annuity is not different, we submit, from the rule that might be drawn from the cases which pass on investments made of trust funds with the proviso that, as the investment would be deemed a long one, all investments for short periods could not be considered.

Respectfully submitted,

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In the Supreme Court of the Territory of Hawaii

OCTOBER TERM, 1907

No. 417

HANNAH FITCHIE, BARRY FITCHIE, HANNAH FITCHIE and BARRY FITCHIE, Executors under the Will of Eliza Fitchie, deceased, ELIZA FRENCH, JOHN GALBRAITH, WILLIAM GALBRAITH, SAMUEL GALBRAITH, MARTHA CULLY, MARGARET JANE ROME and HUGH GALBRAITH,

Appellants,

vs.

CECIL BROWN and WILLIAM O. SMITH, Executors under the Will of George Galbraith, deceased, and the HAWAIIAN TRUST COMPANY, LIMITED,

Appellees.

On Appeal from the Supreme Court of the Territory of Hawaii.

BRIEF FOR CECIL BROWN AND WILLIAM O. SMITH, EXECUTORS UNDER THE WILL OF GEORGE GALBRAITH, DECEASED, APPELLEES.

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Attorneys for Cecil Brown and William O. Smith, Executors under the Will of George Galbraith, deceased.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

No. 263.

HANNAH FITCHIE, BARRY FITCHIE, HANNAH FITCHIE and BARRY FITCHIE, Executors under the Will of Eliza Fitchie, deceased, ELIZA FRENCH, JOHN GALBRAITH, WILLIAM GALBRAITH, SAMUEL GALBRAITH, MARTHA CULLY, MARGARET JANE ROME and HUGH GALBRAITH,

Appellants,

vs.

CECIL BROWN and WILLIAM O. SMITH, Executors under the Will of George Galbraith, deceased, and the HAWAIIAN TRUST COMPANY, LIMITED,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR CECIL BROWN AND WILLIAM O. SMITH, EXECUTORS UNDER THE WILL OF GEORGE GALBRAITH, DECEASED, APPELLEES.

STATEMENT OF THE CASE.

This is an appeal from the decision and decree of the Supreme Court of the Territory of Hawaii in a case submitted originally

to that Court upon an agreed statement of facts under Section 1748 of the Revised Laws of Hawaii providing that "Parties to a question in difference which might be the subject of a civil action in the circuit court or supreme court may, without action, agree upon a case containing the facts upon which a controversy depends and present a submission of the same to the justices of the supreme court either in term time or in vacation."

The questions involved arise under the residuary devise in the will and codicil of one George Galbraith who died domiciled in Hawaii, leaving as estate aggregating after the payment of debts and legacies other than the residuary devise, about $260,000.

The residuary devise (Tr. p. 9) and the codicil (Tr. p. 10) to the will affecting the same are as follows:

"The balance, residue or remainder of my estate is to be placed in trust for as long a period as is legally possible, the termination or ending of said trust to take place when the law requires it under the statute.

"I hereby nominate and appoint the Hawaiian Trust Company, Limited, of Honolulu, Territory of Hawaii, as trustee of the aforesaid balance, residue or remainder of my estate and they are to devote sufficient of the annual income derived from the same toward paying the following annuities, which are to be free and clear of all taxes, unto the following persons mentioned, namely,

Sam Galbraith's children,	aforementioned.....	$1500.	yearly
Eliza Fitchie	"	1500.	"
Barry Fitchie's children, of Ballydrain, County Down, Ireland		300.	"
Anne Jane Galbraith	aforementioned....	$ 150.	yearly
Minnie Galbraith	"	150.	"

Sarah Patton's children	aforementioned....	$ 300.	yearly
John Galbraith's children	"	500.	"
Kittie Johnston's two nieces	" (each).	100.	"
Maude Fitchie	"	150.	"
Martha Dickinson	"	100.	"
Mannia	"	250.	"
J. Kailuli, alias Galbraith	"	250.	"
Robert William Catheart's children aforementioned		250.	"
Hugh Galbraith aforementioned.		360.	"
Hugh Galbraith's seven children.		2520.	"
Josie Fink aforementioned.		150.	"
Emma Douglas "		150.	"
Matilda Bailey, Ballydrain, Co. Down, Ireland. .		50.	"

"All of the foregoing for life, and then to their heirs, save and excepted the last three persons, namely, Josie Fink, Emma Douglas and Matilda Bailey, who are to receive only their life annuities and at their death all their interests to cease.

"On the final ending and distribution of the trust, the trust fund to be divided equally amongst those persons entitled at that time to the aforementioned annuities."

"1st. Whereas, my nephew, Hugh Galbraith, of Wahiawa, Oahu, T. H., has been provided for by me in my last Will and Testament under paragraph number eighteen, I therefore revoke his participation in and to any of the bequests and benefits devised unto the children of the late Sam Galbraith. Furthermore the annuity devised to the aforesaid Hugh Galbraith and his heirs, I hereby revoke and substitute for it the following: To my nephew, Hugh Galbraith, of Wahiawa, Oahu, T. H., Three hundred dollars ($300.) yearly for life only.

"2nd. The annuity devised unto the seven children of the aforesaid Hugh Galbraith, I hereby revoke and substitute for it

the following: To Hugh Galbraith's seven children, Twenty-one hundred dollars ($2100.) yearly, for life, and then to their heirs.

"3rd. I bequeath and devise unto the Kona Orphanage, of Kona, Hawaii, T. H., the sum of One hundred dollars ($100.) yearly, under the same conditions as the other annuitants mentioned, save and excepted, Hugh Galbraith, Josie Fink, Emma Douglas, and Matilda Bailey."

The named annuitants are some forty in number and the annuities together amount to $8350.

The Hawaiian Trust Company, Limited, one of the appellees herein, the residuary devisee and claiming as such, is in possession of the real estate situated in Hawaii valued at $128,500. The personal property of the estate in Hawaii remaining, valued at about $121,000., is held pending this appeal by these appellees as executors under the will.

The appellants as the legal heirs of the decedent have made claim to the entire residuary estate on the ground that the residuary devise is void.

For the purpose of determining the rights of the parties, the Territorial Supreme Court was asked for instructions and a construction of the will in accordance with the following questions (Tr. pp. 5-6):

"1. Is the trust as to the residue of the estate wholly invalid?

"2. Is said trust wholly valid?

"3. If said trust is wholly valid, when does it end?

"4. If said trust is wholly valid, to whom and in what proportions is the trust fund payable upon the final ending of said trust?

"5. If said trust is neither wholly invalid nor wholly valid, what part of it is valid?

"6. Is there an intestacy as to any portion of the corpus of the residue of the testator's estate?

"(a) Who are the heirs and next of kin of the testator and by what law are they to be determined?

"(b) How is the intestate portion of the residue of the corpus and the amount thereof to be ascertained, and when and by whom can payment of such intestate portion be demanded?

"7. Is there an intestacy as to the annual income remaining after payment of the annuities bequeathed by the will, and, if so, to whom and in what proportions is said surplus income payable?

"8. If there is not an intestacy as to the surplus income annually accruing, to whom and when does it become payable; and what are the duties of the trustee relative thereto?

"9. What estates or rights do the annuitants specifically named other than those 'who are to receive only their life annuities,' and their 'heirs' respectively take under the trust?

"10. Who are the 'heirs' of the annuitants and by what law are they to be determined?

"11. Are any or all of the annuitants under the trust entitled to claim appropriations from the corpus of the trust fund sufficient to produce their respective annuities, and the payment to them respectively of such appropriated portions?

"(a) Upon what basis will the amount of the capital sum be calculated, and at what time or times can said annuitants so entitled, first demand such appropriations, and, second, call upon the trustee to transfer to them respectively the shares of the corpus so appropriated?

"12. Can the Hawaiian Trust Company, Limited, act as trustee under the will?"

The Court held the entire trust provided in the residuary devise valid, holding the duration of the trust to be limited to a period of twenty-one years after the death of the last survivor

of all the named annuitants, the surplus income to be accumulated, and upon the expiration of the period of duration of the trust, the trust fund and accumulated income to be divided as directed in the will.

ARGUMENT.

While denying the soundness of the contention made by the heirs in the Territorial Supreme Court, that the entire trust provided in the residuary devise is invalid, the executors believe, on the other hand, that the decision of the Court was erroneous in holding the entire trust valid. It being their duty to distribute the estate in their hands to the persons legally entitled regardless of invalid testamentary provisions, and conceiving that it is likewise their duty, upon being brought before this Court involuntarily as appellees, to contribute as far as they are able to the sound elucidation of the questions involved, they respectfully submit their views regarding the same.

It is submitted that the trust provided in the residuary devise is valid in so far as it provides for the payment of the annuities specified, but that the provision for final distribution is void; that the annuities succeeding to and other than the life annuities are perpetual; and that there is an intestacy of all that is not required to satisfy the said life and perpetual annuities.

This result follows from either of two independent, but mutually exclusive, lines of reasoning:

1st: THAT THE TRUST PROVIDED IS FOR THE PAYMENT OF THE ANNUITIES SPECIFIED AND THE FINAL DISTRIBUTION IS TO OCCUR ONLY WHEN THE LAW REQUIRES A TRUST FOR THE PAYMENT OF SUCH ANNUITIES TO CEASE, WHICH MAY BE AT A TIME BEYOND THE PERIOD OF TWENTY-ONE YEARS AFTER ANY LIFE IN BEING, FROM WHICH IT FOLLOWS THAT THE PROVISION

FOR FINAL DISTRIBUTION IS VOID BECAUSE IN VIOLATION OF THE RULE AGAINST PERPETUITIES.

2ND: IF, HOWEVER, THE PROVISION FOR FINAL DISTRIBUTION WAS INTENDED TO TAKE EFFECT WITHIN THE PERIOD DEFINED BY THE RULE AGAINST PERPETUITIES, NO DEFINITE TIME IS SPECIFIED BY THE WILL FOR ITS OCCURRENCE, FROM WHICH IT FOLLOWS THAT IT IS VOID FOR UNCERTAINTY.

I. THE FINAL DISTRIBUTION PROVISION VIOLATES THE RULE AGAINST PERPETUITIES.

This proposition depends fundamentally upon the construction to be placed upon the language used in the will.

The purpose of the testator to tie up the residuary estate as long as possible is expressly announced in the words of the will as follows: "The balance, residue or remainder of my estate is to be placed in trust for as long a period as legally possible, the termination or ending of said trust to take place when the law requires it under the statute." (Tr. p. 9.) It can hardly be assumed that the testator knew what that period was; otherwise he would not have used the word "statute," as there is no statute in the Territory on the subject in question. Moreover, had he known of any limitation and the rule thereof, he would naturally have fixed the period of duration of the trust in accordance with the rule instead of leaving it to construction or inference. Can it then be assumed that the testator intended to do more than guard against some limitation that might, although he did not know did, exist? If not, the language must be given its natural meaning,—that the trust to pay annuities shall cease only in case there is some rule of law requiring it, otherwise continue forever. In other words, the primary purpose of the

devise was to establish a fund to secure the payment of annuities for as long a period as possible. The provision for distribution of the trust fund was made to meet the possible contingency of the necessity of some termination at some time of a trust such as this,—a trust to secure the payment of annuities for lives of named annuitants and then to their respective heirs. If the trust for the payment of such annuities could continue forever, that was what the testator desired.

This conclusion is further supported by the fact that the annuities are given to persons whom the testator knew, whereas the final distribution must have been contemplated by the testater as an event that might, and probably would, occur in the far distant future to the benefit of persons whom he could not know and in whom he could have no possible interest.

The sequence is significant in that after first directing the residuary estate to be placed in trust for as long a period as is legally possible, then providing for the payment of certain annuities out of the income, the testator then refers to the final termination of the trust, and follows that reference with a direction as to the disposition of the trust fund upon the happening of that event. Is it not evident that the testator thus referring to the termination of the trust, meant to say that, when the trust for the purposes hereinbefore provided, to wit, for the payment of the specified annuities, could no longer continue but must end as a matter of law, then the trust fund shall be divided?

Further, the language is that the property shall be "placed in trust for as long a period as is legally possible." The only expressed purpose of the trust during its continuance is the payment of annuities. Is it not the natural interpretation to be placed on the language used that when the trust for that purpose can no longer legally continue, then, and then only, a division shall be made?

We urge this interpretation of the language of the will, not

from any technical construction of the language as such, but in view of the purposes that must have stood out most prominently in the testator's mind. We believe it to be the right interpretation and submit that it is certainly a reasonable interpretation. If right, our first proposition necessarily follows.

There is nothing legally objectionable in the indefinite duration of a trust. It is a common occurrence for one person to transfer property to another to hold in trust for the former. Assuming the trustee to be a corporation with a permanent charter, it is quite conceivable that the trust might continue indefinitely, the beneficial interest going from one person to another by conveyance, devise or descent, the termination depending upon the will of the parties.

Gray, The Rule against Perpetuities, Secs. 235, et seq.

As indefiniteness of duration in itself without more does not constitute a defect in a trust, the invalidity for that reason must depend upon the special terms of the trust.

If our analysis of the language of the will is correct, the purpose of the trust is to secure the payment from the income of the trust, of annuities to named persons for life, and, with several exceptions, upon the death of each, the annuity given to him then to go to his heirs for as long a period as the law will permit consistently with the continuance of the trust.

The longest possible period of duration of an annuity would be, obviously, forever. Such an annuity can be created and is known as a perpetual annuity.

Smith v. Pybus, 9 Ves. Jr. 566.

Mansergh v. Campbell, 3 De G. & J. 232, 60 Eng. Ch. 232.

Hedges v. Harpur, 3 De G. & J. 129, 60 Eng. Ch. 129.

Yates v. Maddon, 16 Sim. 613, 39 Eng. Ch. 613.

Stokes v. Heron, 12 Cl. & F. 161.

Hicks v. Ross, L. R., 14 Eq. 141.

Ex parte Wyatt, 5 De. G., M. & G. 188.
Potter v. Baker, 15 Beav. 489.

The creation of perpetual annuities, consisting of life interests in certain named persons and upon the death of each the annuity enjoyed by him to go to his heirs absolutely, is therefore expressly directed by the will.

The intention to create a perpetual annuity, if found, will be given effect. This intention has been expressed in various ways.

Thus in *Mansergh v. Campbell*, 3 De G. & J. 232, 60 Eng. Ch. 232, hereinbefore cited, the testator bequeathed an "annuity or clear yearly rent charge or sum of 300£" to A for life, and after her death to her children equally, to be applied for their support, etc., until the youngest of them should attain the age of twenty-one years, and then the annuity to be sold and the proceeds thereof divided. This annuity was charged upon all the testator's freehold estate. The court found from these terms that a perpetual annuity was intended to be, and was, created. The Lord Chancellor in his opinion said: "Yet it appears from several authorities that an intention to give what is called a perpetual annuity may be collected from a will without any express declaration to that effect."

See *Hedges v. Harpur*, 3 De G. & J. 129, 60 Eng. Ch. 129.

In *re Morgan*, (1893) 3 Ch. D. 222, at page 229, 60 Eng. Ch. 129, Lord Justice Lindley says: "It is equally free from doubt that where the testator indicates the existence of the annuity without limit after the death of the person named, and therefore implies that it is to exist beyond the life of the annuitant, then the annuity is presumed to be a perpetual annuity." This language is particularly applicable to the present case where, except in the instances of the annuities that are expressly

limited to the lives of the first takers respectively, the annuities, which form the entire substance of the trust, are not only without limit except such as the law requires, but are affirmatively bequeathed for as long a period as is legally permissible, which certainly means perpetually, if legally possible.

Taylor v. Martindale, 12 Sim. 158, 59 Eng. Rep. (Full Reprint) 1092, 35 Eng. Ch. 134.

Again in *Stokes v. Heron,* 12 Cl. & F. 161, in the House of Lords, Lord Cottenham in his opinion said: "The other ground which is equally effective for the purpose of showing that those annuities are to be considered in their extent as perpetuities, is that the testator deals with them as being in existence and operation beyond the period of the lives of those who are first to enjoy them." Further, "'The said annuities after the decease of my wife and her mother, to be equally divided between my three children.' Well, then, whatever it might be, it cannot be that the duration of the subject matter of the gift was to be measured by the life of the first taker; because he actually provided who shall enjoy this property after the expiration of those lives. We have, therefore, not only the property directed to produce annuities which annuities are clearly to last longer than the lives of those who are first to enjoy them, but we have a disposition of the interest in the subject matter of the gift more extensive than the duration of those lives." Further, "In the case before Lord Alvaney, it was to go amongst survivors, and here it is to different individuals; both showing that the duration of the subject matter of the gift was not to be confined to the life of the person who was to take, but that it was to have some further duration, and if it was to have some further duration, no other period can be fixed for that duration short of making it perpetual."

Yates v. Madden, 16 Sim. 613, 39 Eng. Ch. 613.

Moreover, the words of limitation of these annuities are as

follows: "All of the foregoing for life and then to their heirs." (Tr. p. 9.) These words, if used in a grant or devise of real estate, would describe an estate in fee simple, whether in one estate under the Rule in *Shelly's Case*, or in a life estate followed by a remainder in fee.

Words of limitation which applied to real estate, would describe an estate in fee, will, if applied to an annuity, describe a perpetual annuity.

Smith v. Pybus, 9 Ves. Jr. 566, 573.

In the case last cited, the Master of the Rolls, Sir William Grant, said: "What degree of perpetuity there is in this annuity, with reference to the takers, I will next consider. It is admitted an annuity to a man and his heirs would constitute a perpetual annuity."

It will hardly be disputed, therefore, that perpetual annuities, whatever executory limitation may be imposed upon them by the final distribution clause, are directed by the will, both by actual intention expressed and by the technical character of the words of limitation used.

No sound objection to the trust, in so far as the annuities are concerned can be presented. If the final distribution clause is valid, it must be found to be limited to take effect at a time legally permissible by law. As that occurrence will end the entire trust the other provisions of the trust will be valid as a matter of course. No question of inalienability would be presented, as no restraint on alienability is attempted. If, on the other hand, as we contend, the final distribution clause is void, there is necessarily an intestacy of all interests except the annuities. There is no legal objection to the necessary continuance of the trust pending the life annuities. After the termination of the life annuities, the whole trust is determinable at any time by the will of the persons entitled to the income of the

trust, viz: the perpetual annuitants and the persons entitled to the intestate surplus portion thereof.

We are then brought to the final distribution clause, by the terms of which (Tr. p. 9) the trust fund, "on the final ending and distribution of the trust," is "to be divided equally amongst those persons entitled at that time to the annuities."

It was admitted by all parties in, and decided by, the court below (Tr. p. 28) that the Rule against Perpetuities is in force in the Territory of Hawaii. Some such rule, while arbitrary, is recognized generally as justified and desirable as a matter of policy. The only statute in the Territory upon which the existence of such a rule depends is Section 1 of the Revised Laws of Hawaii, and is as follows:

"The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory of Hawaii, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage, *provided*, however, that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the Territory of Hawaii."

It seems clear even aside from, but indisputable under, the quoted statute that the common law Rule against Perpetuities is law in the Territory.

Gray (2nd Ed.), Preface, Secs. 98, 200, 201.

Under the common law Rule against Perpetuities, in order to be valid, a future interest in property must be such that "it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." It is not saved from invalidity because it may, or probably will, vest within the required period. It is void if the contingent event upon

which the vesting of the interest depends "can possibly happen beyond those limits."

Gray, Secs. 201, 214, *et seq.*

In this case, the final division of the trust fund is to occur among persons then for the first time ascertainable, when according to our analysis, the trust which is directed to continue to secure the payment of the annuities for as long a period as is legally possible, must terminate. If that may or even can possibly happen beyond the limits prescribed by the Rule against Perpetuities, the final division or distribution clause is void under the Rule.

We have found that a trust for the payment of perpetual annuities only may continue forever, depending upon the will of the persons entitled to the entire income from the trust, who would be the annuitants and such other persons as would be entitled to the undisposed of surplus. Were there no other element in this case, it is clear that the termination of the trust, when the distribution of the trust fund is to occur, may never occur, or if it does occur, may occur at a time beyond lives in being and twenty-one years thereafter, and, therefore, the conclusion that the provision for final distribution is void under the Rule against Perpetuities would be inevitable.

There is another element, upon which reliance was placed by counsel opposing our contention in the territorial court. It is the element of surplus income unrequired to the payment of the annuities.

It is contended that as the trust fund here consists of both real and personal property, the rule of presumption that a future gift of capital consisting of personal estate or personal and real estate mixed, carries with it undisposed of intermediate income, which must therefore be accumulated, is applicable.

Gibson v. Montfort, 1 Ves. Sr. 485.

Genery v. Fitzgerald, 1 Jac. 468.

From this it is argued that the accumulation of the surplus income in favor of those persons designated as the recipients in the ultimate division, forming a part of the purposes of the trust, the trust for that purpose cannot legally continue beyond the period prescribed by the Rule against Perpetuities, and, therefore, it was the intention of the testator, or it is the effect of the language he used, that the entire trust should terminate within that period.

If the rule of presumption relied upon were applicable to the facts here, it might be admitted that the construction urged should be given to the testator's language. But it is submitted that the rule of presumption has no application in this instance.

The rule of presumption is not based in any case upon any necessary implication of fact. This is sufficiently well shown by the diametrically contrary rule of presumption applied where the capital consists of real estate only, in which case the undisposed of intermediate income goes to the heir of the testator as intestate estate and is not accumulated to follow the capital.

Hopkins v. Hopkins, 1 Ves. Sr. 268.
Bridgewater v. Egerton, 2 Ves. Sr. 122.
Att. Gen. v. Bowyer, 3 Ves. Jr. 714, 725.

The rule is at the most a rule of implication and, as in the case of any such rule, is adopted to accomplish, not what the person to whom the intention is thereby attributed actually intended, for, where no expression of intention appears, as a rule no actual intention existed, but rather to accomplish what he most probably would have directed had his attention been drawn to the subject. If any actual intention were shown, either by expression or by implication in fact from other expressions, there would be no occasion for referring to a rule of construction. The actual intention so expressed would control. And likewise, if a contrary intention is actually evinced either by express words

or by implication in fact, the rule of construction would be disregarded and the actual intention given effect. It seems equally clear that a rule of construction adopted to supply the want of expressed intention cannot be used for the purpose of determining actual intention in other respects, when by hypothesis the rule of construction is applicable only in cases where no intention is shown and therefore the result to be attained by the application of the rule could not have been a factor in the mind of the speaker or writer in expressing himself.

In construing a written instrument, therefore, the first object should be the ascertainment of the full actual meaning of the instrument. If then, and then only, there is room and the occasion to apply established rules of construction without overthrowing the actual meaning so ascertained, that will be done.

If the testator's intention was that the trust should continue as long as legally possible consistently with the legal distribution under the final division clause, the trust, if the testator's directions are followed, must terminate within a period prescribed by the Rule against Perpetuities. The testator's actual intention having been thus ascertained, there is no inconsistency or conflict involved in applying the rule of presumption that the testator intended the intermediate surplus income to be accumulated, and, therefore, undoubtedly the rule should be applied.

On the other hand, again, if our analysis is sound, the testator's actual intention was that the trust should continue for the payment of the annuities as long as that should be legally possible, but when the law should require the trust for that purpose to cease, that then the division take place. By adding to the trust an implied provision for accumulation of surplus income under the rule of construction, to be valid the trust for that purpose must necessarily terminate within a period prescribed by the Rule against Perpetuities. But as a trust to

secure the payment of such annuities as are described in the will may continue beyond any such period, the application of the rule of construction would operate to thwart the expressed intention of the testator. *A fortiori* the rule of construction should not be applied.

The alternative is that the surplus income is intestate.

The objection to our conclusion that the final division and distribution clause violates the Rule against Perpetuities and is therefore void, fails.

II. THE FINAL DISTRIBUTION PROVISION IS VOID FOR UNCERTAINTY.

If the reasoning thus far advanced and the resulting conclusion are sound, the consideration of the second proposition is unnecessary. If, however, those views are not accepted, the proposition that the final distribution clause is void for uncertainty must be met and refuted before the conclusion that the entire trust is valid can be reached.

For the purposes of this branch of the argument, we shall assume, as contended by counsel for the trustee and held by the territorial court, that the testator in directing the residuary estate "to be placed in trust for as long a period as is legally possible" (Tr. p. 9), intended the continued existence of the trust as long as the law would allow consistently with legal consummation of the final distribution clause.

The provision for final distribution is of course a gift of a future interest to persons who can be ascertained for the first time at the moment of the termination of the trust, and is therefore an attempt to create interests which cannot vest until that time. These interests are, therefore, future interests, which, to be valid under the Rule against Perpetuities, must vest within lives in being at the time of the testator's death and twenty-one years thereafter.

If, therefore, the testator intended, as assumed, the trust to terminate at such a time that the final distribution clause might legally take effect, his words must be taken to mean that the termination of the trust shall occur within the period prescribed by the Rule against Perpetuities, namely, lives in being at the time of his death and twenty-one years thereafter.

The period prescribed by the Rule is, however, necessarily variable, depending upon what lives are selected to measure the period, the selection of which must be made by the testator.

"The contingency may be postponed for any number of lives, provided they are all in being when the contingent interest is created; and the persons whose lives are taken need have no interest in the estate."

Gray, Sec. 216.

Thellusson v. Woodford, 11 Ves. Jr. 112.

Obviously the longest period within the Rule would be during the life of that person who of all persons in the world living at the time of the making of the gift shall survive the longest and twenty-one years thereafter.

That period is the only period that corresponds to the testator's direction in this will, for the latest point of time at which the final distribution clause could have been made to take effect legally and therefore the most distant point of time to which the trust could continue is at the end of twenty-one years after the death of that person who of all persons in the world living at the time of the testator's death shall survive the longest.

Had the testator by chance specified the life of that person for the purpose of defining the duration of the trust, he would in fact have accomplished his purpose. It is quite conceivable that had the testator attempted to select that particular person, he might in fact by extraordinary chance have succeeded. This, however, he has not attempted to do except by saying

generally, in effect, twenty-one years after the death of that person among all the persons in the world living at my death, whomsoever he may be.

But the proof and ascertainment of the identity of that person, left thus unnamed, and his death are impossible as a practical matter, and the time of his death, marking the beginning of the period of twenty-one years to follow, must forever remain uncertain, and the gift dependent upon the happening of that event can therefore never be given effect. Accordingly, in a case where a testatrix had bequeathed some personal property in trust to apply the income therefrom in the maintenance of a tomb "for the longest period allowed by law, that is to say, until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death," the bequest was held void for uncertainty.

In re Moore, L. R. (1901) 1 Ch. 936.

The court said: "It is impossible to ascertain when the last life will be extinguished, and it is, therefore, impossible to say when the period of twenty-one years will commence."

Id., p. 938.

It follows that likewise in the present case, the final distribution clause is void.

The contention of counsel for the trustee and the decision of the territorial supreme court that the lives of the named annuitants must be taken to have been designated by the testator for the purpose of the Rule against Perpetuities, we submit, are unsound.

There is certainly no express designation of the lives of the named annuitants. We pass by the declaration of the territorial court that "in this case the lives *clearly* intended are those of the annuitants mentioned" (Tr. p. 32), as too extravagant to require comment. That the testator did not even have the

lives of the named annuitants in mind for that purpose is abundantly proved by his reference to "the statute" (Tr. p. 9) as containing whatever limitation on the duration of the trust there might be, when in fact there was no statute pertaining to the subject. Furthermore, who can say that any one of the named annuitants will survive as long as any one of ten thousand other persons who were living at the time of the testator's death? And if they do not, what justification is there for thus limiting the continuance of the trust enjoyed meantime by the annuitants, to a period shorter than the law would allow in direct contravention of the testator's injunction that it shall continue "for as long a period as is legally possible." Why attribute to the testator an intention not expressed, the effect of which will be to subvert his expressed intention that the trust shall continue as long as the law will allow? That the adoption of the primary or natural meaning of the words in the will would lead to an impracticable result or one incapable of being carried out, is no reason for attributing to him an intention that does not accord with the express words used.

The contention was made in the court below that this case is governed by a number of English cases, in which words somewhat corresponding to the words used in the Galbraith will, "as long as legally possible," are used, some of which constitute the so-called "Heirloom cases," in which the typical direction of the testator is that certain personal effects shall go or be settled as far as possible in accordance with the limitations in the settlement of certain real property or a title, and others of which are simply cases of executory trusts.

Harrington v. Harrington, L. R., 5 Eng. & Ir. App. Cas. 87.

Shelley v. Shelley, L. R., 6 Eq. Cas. 540.

In re Johnston, L. R., 26 Ch. D. 538.

In this case we have no reference to any other settlement which may serve as a guide to the limitations desired. Nor is the trust executory, for the direction is that the trust shall continue for the *longest* period legally possible. All that is left for the court to do is to ascertain and specify that person of those living at the time of the testator's death who will survive the longest—a task incapable of being performed.

It remains to consider one case, *Pownall v. Graham*, 33 Beav. 242, which was cited below as an authority "precisely in point and squarely in * * * favor" of the contention made on behalf of the trustee.

In that case, the testator by will left real and personal property to trustees in trust to pay the income thereof to three of the testator's brothers during their lives; after their decease, to two other brothers during their lives; and after their decease, to two remaining brothers during their lives; the shares of those dying, all of whom are referred to by name and were therefore living when the will was made, to be enjoyed by the survivors. After the death of all his said brothers, he directed the trustees to apply the income for the use and benefit of such of his brothers' children as should stand most in need thereof "as the law in such cases admits," and ("after the law, as mentioned aforesaid, admits of no further division" among his brothers' children in the manner specified) to assign over the trust estate to one of the sons of his brothers.

The contention was made that the lives selected were those of all the nephews and nieces who might become beneficiaries under the will who were living at the time of the testator's death. The court, however, held that the lives to be taken were the lives of the brothers.

It is to be observed that the testator expressly directs the payment of the income to his brothers for their lives without any other limitation, and it is only upon the death of the last sur-

vivor of his brothers that the division of the income is directed for such further period as the law would allow. In other words, the final gift over is directed to take effect after specific lives in being, the lives of the brothers, and such further period thereafter during which the law would allow a division of income in the manner directed. The question was, therefore, simply, during what further period of time after lives in being at the testator's death will the law admit of such division as that directed. That further period is definitely fixed and invariable and is twenty-one years. The lives in being from which that future period was to be computed were the lives of the brothers. During the period of twenty-one years after the death of the last surviving brother, therefore, the division of income among the children might, and was, therefore, directed to continue.

In the Galbraith will, the direction is that the entire trust, including the life annuities, the annuities to the heirs, and, as we have assumed for the purpose of this branch of the argument, the final division, shall continue as long as legally possible. It does not provide that the trust is to continue as long as legally possible after the lives of the annuitants. Had it done so, those lives would have been expressly referred to as marking the first part of the duration of the trust just as the lives of the testator's brothers were referred to in *Pownall v. Graham* as defining the first part of the duration of the trust there involved. That difference discriminates *Pownall v. Graham* from the present case and for that reason, it lends no support to the trustee's contention.

We submit, therefore, that the final distribution clause is void, if not because in violation of the Rule against Perpetuities, at least for uncertainty.

EFFECT OF INVALIDITY OF FINAL DISTRIBUTION CLAUSE.

Since the final distribution clause is void, whether because in violation of the Rule against Perpetuities or for uncertainty, the preceding interests become what they would have been had the clause been omitted from the will. The rule entailing this result is well settled.

Gray, Sec. 247, *et seq.*

Had the final distribution clause been omitted from the will, it is clear that at the most there would have been a trust to secure the payment of the life annuities to the named persons and perpetual annuities to the heirs of some of the life annuitants, except as to the Kona Orphanage, which not being subject to human death, we think would also be entitled to a perpetual annuity. As the final distribution clause, if allowed to take effect, would be an executory limitation upon the annuities, being void it is ineffective to curtail the annuities; from which it follows that there is a valid trust to secure the payment of the life annuities specified and perpetual annuities to the heirs designated and the Kona Orphanage. As to every other interest, there is an intestacy.

SPECIFIC RIGHTS OF PARTIES INTERESTED.

The trustee is already in possession of real estate constituting a part of the residuary estate, valued at over $128,000., all but a small part of which is under lease for 50 years from September 17, 1900, at a rental of $10,000. per annum (Tr. p. 3). These appellees as executors hold personal property also constituting a part of the residuary estate, valued at over $120,000. (Tr. pp. 2-3).

The heirs of the deceased claiming the entire residuary estate, including the part held by these appellees, and the trustee claim-

ing the same as residuary devisee and trustee, these appellees are subjected to conflicting claims and are therefore entitled to instructions as to their duties of distribution.

While the trustee is named as residuary devisee and legatee, it is entitled to receive as against the heirs, only so much of the residuary estate as is necessary to perform the trusts.

Head v. Lord Teynham, 1 Cox. 57.

——— ——— *v. Walford*, 4 Russ. 372.

Perry on Trusts, Sec. 312.

It must therefore be determined what will be required by the trustee to perform the trusts legally provided.

Life annuitants are entitled at the most to have such an amount of the property upon which their annuities are charged, as will be sufficient to secure with practical certainty the payment from its income of the annuities, set aside to provide for their payment. The residuary legatee or devisee, or the heirs in case of an intestacy, are entitled immediately to the balance.

Accordingly, in a recent case in the English Court of Appeals, it appeared that the testator had given the residue of his personal estate to trustees upon trust to keep the same invested and out of the annual income therefrom to pay several life annuities. In case the income should in any year be insufficient for that purpose, the trustees were directed to abate the annuities for that year pro rata. Upon the death of the last annuitant, the trustees were directed to hold the trust fund and the accumulations for five charities.

All but one of the annuitants accepted certain sums in full satisfaction of their annuities; this one refused and insisted upon his rights under the will.

Proceedings were brought by the charities for a division in their favor, which was resisted by this annuitant on the ground that he was entitled to the entire residue as security for his annuity. The chancery division held that the life annuitant

was only entitled to have an amount set aside to secure the payment of his annuity sufficient to accomplish this with practical certainty, and that the charities were immediately entitled to the balance.

Stirling, J., in his opinion, after stating that in the ordinary case of a gift of an annuity followed by a gift of the residue, the practice of the courts had been clear that the annuitant is entitled to have sufficient security set apart for the payment of his annuity, said: "Now here the annuitant has no right to resort to capital. Her annuity is to be paid solely out of income. But it seems to me that the same principle applies and she would be entitled to have such portion of the corpus appropriated for the payment of her annuity as would make it practically certain that her annuity would be paid by means of the income of the portion. That seems to me to be her right."

This was sustained on appeal to the Court of Appeals.

Lindley, L. J., there said: "But counsel for the appellant argued that inasmuch as Mrs. Venable's annuity was charged upon the whole residuary estate, Stirling, J., had no jurisdiction to order the residuary estate to be divided; and that the will which gave her the annuity, and gave the charities the residuary estate, is so worded that the residue is not divisible until after payment of the annuity. Counsel's point was that the payment in respect of the annuity will not come to an end until Mrs. Venable's death, and that upon the terms of the will there is no jurisdiction in the Court to order the residuary estate to be distributed until after her death. Now, according to the strict language of the will, that no doubt is so. But what is the meaning of a will which charges a residuary estate with a legacy or several legacies of this kind, and directs that upon the death of the survivor of the annuitants the residue is to be divided? As between the annuitants on the one hand and the residuary legatees on the other, it is a gift of the residue

subject to the payment of the annuities. And if the annuities are released or ample provision is made for the payment of them, it has been the invariable practice of the court to let the residuary legatees have what is theirs subject to the payment of the annuities."

Harbin v. Masterman, L. R. (1896) 1 Ch. 351.
See also *Healey v. Toppan*, 45 N. H. 243.

A perpetual annuitant, on the other hand, is not confined to the enjoyment of the perpetual continuance of his annuity; his annuity, even though charged upon the income only of a certain fund, represents an interest in the fund, which belongs to him absolutely. The amount of that interest, and he can demand the payment to him of that amount in satisfaction of his annuity, is measured by the amount that would be required to produce the amount of his annuity. This right is well settled.

In *Potter v. Baker*, 15 Beav. 489, 51 Eng. Rep. (Full Reprint) 627, the facts were that a testator had devised all his property to his executors to be invested to the best advantage, in trust, among other things, to pay £50 per annum to his daughter for life, and then one-half thereof to E. L. and the other half to M. A. B. Subject to these gifts, the property was devised over to others.

Upon the death of the daughter the personal representative of E. L., the latter being already deceased, claimed from the estate upon which the annuity was charged, one-half of an amount sufficient to produce £50 per annum.

It was held the annuity was perpetual and that the personal representative was entitled to such an amount from the capital.

In *Bent v. Cullen*, L. R., 6 Ch. App. 235, the testator bequeathed his personal estate to his executors in trust to pay out of the income therefrom £50 a year to his wife for life or so long as she should remain a widow, and then to his two daugh-

ters and his granddaughter equally, or the survivor of them. The remainder of the income from the estate, he bequeathed over to others.

This was held to be in legal effect a gift of the capital to the extent of an amount sufficient to produce this annuity, which the owners of the annuity might claim.

The Lord Chancellor, Lord Hatherley, on page 238, said: "However, the cases are clear upon this, that a gift of the income of a fund to a particular person or persons is a gift of the whole fund. If I give all the interest of a given fund to A. B., and say nothing more A. B. takes the whole fund. Can it be different when I give £100, part of the interest of a given fund, to A. B.? Surely he takes the principal that produces that sum of £100."

Smith v. Pybus, 9 Ves. Jr. 565, 725.
Hicks v. Ross, L. R., 14 Eq. 141.
Huston v. Read, 32 N. J. Eq. 591.
Bradhurst v. Bradhurst, 1 Paige (N. Y.) 331.

The application of these rules of law to the present case is plain.

The heirs at law of the testator can insist that an immediate appropriation of an amount from the residuary estate sufficient to secure the payment of the life annuities with practical certainty and to meet the rights of the perpetual annuitants in the estate on which their annuities are charged, be made and that the balance be distributed among them as intestate estate.

The amount to be so appropriated being all that will be required to the performance of the trusts legally imposed, the trustee is entitled to demand from the executors only so much of the personal ty held by them as shall be required to be added to the property of the residuary estate already held by the trustee to make up that amount. Of the balance, being unnecessary

to the performance of the trusts, the heirs at law of the decedent are entitled to direct distribution among them by the executors.

The amount that shall be deemed necessary properly to secure the rights under the trust, we suggest would ordinarily be measured by first class trust investments. That will at once provide a fund sufficient to secure the payment of the life annuities and upon the cessation of the life annuities to pay to the perpetual annuitants their shares of the capital.

In *Nash v. Cutler*, 19 Pick. (Mass.) 167, the amount appropriated to secure the payment of life annuities amounting to $475. per annum was $10,000., or an amount that at the rate of $4\frac{3}{4}\%$ per annum would yield the required amount per annum.

Buchanan v. Deshon, 1 H. & G. (Md.) 280.

Perkins v. Emory, 55 Md. 27.

CONCLUSION.

In the view of these appellees, therefore, the Galbraith will provides a valid trust to secure the payment of life and perpetual annuities without limitation, the final distribution clause being void, either because it violates the Rule against Perpetuities or because it is uncertain. In view of the demand of the heirs at law of the testator upon the executors, the trustee is entitled to receive from the latter only so much of the personal estate remaining in their hands as in addition to the property already in the possession of the trustee will adequately ensure the payment of the life annuities and upon their cessation liquidate the rights of the perpetual annuitants to share in the capital appropriated to secure the payment of the annuities. The measure of sufficiency for that purpose should be first class trust investments. The balance, being intestate, should be distributed by the executors to the heirs at law directly.

It is submitted that the decision and decree of the territorial supreme court should be corrected accordingly.

With the other questions involved in this appeal, these appellees are not concerned and, therefore, do not attempt to deal with the same.

Respectfully submitted,

WILLIAM O. SMITH,

A. LEWIS, JR.,

CLARENCE H. OLSON,

Attorneys for Cecil Brown and William O. Smith, Executors under the Will of George Galbraith, deceased,

Appellees.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 47.

HANNAH FITCHIE, BARRY FITCHIE, HANNAH FITCHIE AND BARRY FITCHIE, EXECUTORS UNDER THE WILL OF ELIZA FITCHIE, DECEASED; ELIZA FRENCH, JOHN GALBRAITH, WILLIAM GALBRAITH, SAMUEL GALBRAITH, MARTHA CULLY, MARGARET JANE ROME, AND HUGH GALBRAITH, APPELLANTS,

vs.

CECIL BROWN AND WILLIAM O. SMITH, EXECUTORS UNDER THE WILL OF GEORGE GALBRAITH, DECEASED, AND HAWAIIAN TRUST COMPANY, LIMITED, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

REPLY BRIEF FOR THE APPELLANTS.

I.

The trustee has filed a supplementary brief in which the statement is made that the appellants seem to make two contentions:

(1) That the testator did not indicate that any lives in being should be taken for the measurement of the period.

(2) That he indicated that lives should be taken but left it uncertain what those lives should be.

In answer to the first contention, it is argued that if no lives were indicated by the testator, the result would be that the trustee would have distributed the property at the end of twenty-one years after the testator's death.

The appellants do contend that the testator did fail to indicate *any* lives for the measurement of the period. He did say, however, that he desired the trust to continue as long as the law would allow. That period, as defined by the rule against perpetuities, would be during lives in being and twenty-one years thereafter and not merely twenty-one years. The trustee's contention is, therefore, unsound, for the period of twenty-one years being a period less than that which the law allows, necessarily does not correspond to the testator's direction, and would entirely change the *personnel* of the parties he directed should enjoy the ultimate distribution.

What the testator has done is to direct that the trust shall continue for the longest period that the law will allow, which in fact is the period defined by the rule against perpetuities, and this includes lives in being, and he has failed to meet the essential requirement of the rule, namely, the designation, by himself, of the lives in being. The limitations are therefore incomplete and the final division clause is therefore void.

II.

One of the principal arguments made by the trustee in its opening brief in favor of the construction that the lives of the life annuitants named in the will have been sufficiently designated by the testator for the purpose of satisfying the rule against perpetuities is that—

"the choice lies between that and nothing;"
"the choice is between this and intestacy;"

therefore, as there is a presumption against intestacy, it must be presumed that the testator intended to designate the lives of the life annuitants as measuring the period (Trustee's Brief, p. 9).

The presumption against intestacy, however, is at most merely a presumption raised that the testator intended to make a testamentary disposition of his property, rather than to leave it intestate; and not a presumption that the testator intended to make a testamentary disposition that will meet the requirements of the law and be valid rather than one that will not meet those requirements and will be invalid.

But no one contends that this testator did not intend to make testamentary disposition of his estate. The sole question is whether or not the testamentary terms of the residuary devise are valid or invalid. If invalid, they are invalid in spite of the testamentary intention of the testator, and any rule of presumption that the testator intended to leave his estate testate rather than intestate is of no assistance and is beside the point.

III.

Pownall v. Graham (33 Beavan, 242).

In the trustee's brief (pp. 9, 13), the statement is twice made that in the Galbraith will only one set of lives is named to which reference could be made for the purpose of satisfying the requirements of the rule against perpetuities—*i. e.*, the life annuitants named. This is urged as a reason for the conclusion that those lives are indicated by the testator for that purpose, and for the same reason it is assumed that the case at bar is a stronger and simpler case than that of *Pownall v. Graham*. We submit, however, that there are, on the contrary, three distinct sets of lives named in the

Galbraith will to which reference might have been made in respect of the rule against perpetuities by the testator, had he so chosen to do:

1st. The pecuniary legatees;

2d. The life annuitants named;

3d. Those of the persons who will become the heirs of the named life annuitants who were living at the time of the death of the testator. All are mentioned within the four corners of the will, and any one or all the three sets might have been referred to by the testator for the purpose of meeting the requirements of the rule against perpetuities.

The statement upon which the trustee's deduction is founded is therefore erroneous. Upon the facts it is clear, therefore, that the contention that this case is a simpler or stronger case than *Pownall v. Graham* fails.

The fact that there are two distinct sets of persons mentioned in the Galbraith will, other than those of the named life annuitants, that might equally well have been designated by the testator for the purpose of measuring the period of duration of the trust, makes it all the more conclusive that the testator makes no designation whatever of the lives named in the will. If anything is clear in the Galbraith will it is that the testator has not expressly or impliedly indicated the lives of the pecuniary legatees as measuring any part of the period of duration of the trust. What feature in the will justifies the conclusion that the testator did designate the lives of the life annuitants that is inapplicable to the pecuniary legatees? What feature in the will indicates that the testator intended to designate the lives of the life annuitants, but not those of the persons who will become the heirs of the life annuitants, who were living at the time of the death of the testator? The only feature that gives color for discrimination is the fact that the named annuitants' rights are limited to their lives. Suppose, however, one or more of the pecuniary legatees had received life interests only by the terms of the will. The only feature in the will as in fact drawn, differentiating the life annuitants

from those pecuniary legatees, would then be eliminated. But we doubt that anyone would go to the extent of contending that such a change in the terms of the will would bring such pecuniary legatees within any reference to lives for the purposes of the rules against perpetuities. If not, we submit that it is equally true that the life annuitants are not designated for the purpose in question.

If the life annuitants are designated by the testator what reason is there for saying that he has not also designated the lives of those persons living at the time of the testator's death who will become the heirs of the life annuitants? The testator has directed that the trust shall continue as long as is legally possible. By including those persons who will become such heirs of the life annuitants, the class of persons whose lives are to measure the period of duration of the trust would be thereby increased, and the period of duration correspondingly increased. The mere fact that the court below did not even consider those persons is a sufficient demonstration of the soundness of the conclusion that the testator not only did not designate those persons, but also that he did not designate the lives of the life annuitants.

IV.

THE ASSIGNMENTS OF ERROR.

The contention is made that in case the final division clause is declared void this court will remit the case to the court below for the determination of the rights and method of distribution, because no error is assigned permitting the consideration by this court of that question (Trustee's Brief, pp. 3-4).

Attention is called to the second error assigned:

> "Second. That the court erred in ordering, adjudging and decreeing that the executors of the said will, after the payment of debts, legacies, costs and counsel fes allowed by the court, and upon approval of

their final accounts, deliver to the Hawaiian Trust Company, Limited, the trustee named in the said will, all the residue of the estate of said George Galbraith."

(Rec., p. 35.)

If the court below erred in ordering the executors to deliver to the trustee the entire residue of the estate in their hands, the question necessarily arises, What then shall be done with that residue? The 6th question submitted to the court upon the submission (R., p. 5) is a request for instructions upon that point. That question must be answered, and we submit that, as this is an equity case, this court should announce the rule governing the rights and method of distribution and thus finally dispose of the questions that could properly be considered upon the case submitted to the territorial court.

We have presented the contention on our main brief that in case the final division clause, and that only, is declared invalid, the heirs will be entitled to receive immediately whatever of the estate is not required to secure the payment and satisfaction of the annuities. As the trustee is already in possession of, and under the residuary devise of the will has the legal title to, the real estate, it will be entitled to receive from the executors such an amount of the personal estate in their hands as will be required in addition for it to carry out the terms of the valid part of the trust; the balance the executors must distribute immediately among the heirs.

Respectfully submitted.

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Office Supreme Court, U. S.
FILED.
OCT 26 1908
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 47.

HANNAH FITCHIE ET AL., APPELLANTS,

vs.

CECIL BROWN ET AL., EXECUTORS, &c.

SUPPLEMENTARY BRIEF FOR THE APPELLEES.

George Galbraith by his will directed that his property should be placed in trust for as long a period as possible, the termination of the trust to take place "when the law requires it."

The requirement of the law is that property shall not be tied up beyond a period measured by lives in being and twenty-one years.

The appellants in their brief seem to make two contentions:

First. That the testator did not indicate that any lives should be taken for the measurement of the period.

Second. That he indicated that lives should be taken, but left it uncertain what those lives should be.

We do not believe that the first contention is correct, but if it is the appellants fail.

Where there are no lives taken for the measurement of the period, the time for which the property can be tied up is twenty-one years. If this contention were correct, the only result would be that the trustees would have to distribute the property at the end of twenty-one years after the testator's death.

The second contention is considered in the original brief.

JOHN C. GRAY,
ROLAND GRAY,
Of Counsel for Appellees.

Supreme Court of the United States

OCTOBER TERM, 1907

No. 47.

HANNAH FITCHIE ET AL.,

APPELLANTS,

v.

CECIL BROWN ET AL.,

APPELLEES.

BRIEF FOR THE APPELLEE, THE HAWAIIAN TRUST COMPANY, LIMITED.

JOHN C. GRAY,

ROLAND GRAY,

Of Counsel.

Supreme Court of the United States.

October Term, 1907.

No. 263.

HANNAH FITCHIE ET AL., APPELLANTS

v.

CECIL BROWN ET AL., APPELLEES.

BRIEF FOR THE APPELLEE, THE HAWAIIAN TRUST COMPANY, LIMITED.

STATEMENT OF THE CASE.

The will of George Galbraith, of Honolulu, after giving several pecuniary legacies, provides as follows:—

"The balance, residue or remainder of my estate is to be placed in trust for as long a period as is legally possible, the termination or ending of said trust to take place when the law requires it under the statute.

"I hereby nominate and appoint the Hawaiian Trust Company, Limited, of Honolulu, Territory of Hawaii, as trustee of the aforesaid balance, residue or remainder of my estate and they are to devote sufficient of the annual income derived from the same toward paying the following annuities, which are to be free and clear of all taxes, unto the following persons mentioned, namely,

[Names of annuitants, and amounts which they are to receive yearly.]

"All of the foregoing for life, and then to their heirs, save

and excepted the last three persons, namely, Josie Fink, Emma Douglass, and Matilda Bailey, who are to receive only their life annuities and at their death all their interests to cease.

"On the final ending and distribution of the trust, the trust fund to be divided equally amongst those persons entitled at that time to the aforementioned annuities." (Rec., p. 9.)

A codicil changes some of the annuities, and gives to the Kona Orphanage $100 "under the same conditions as the other annuitants mentioned," save the annuitants for life only. (Rec., p. 10.)

In the Supreme Court of Hawaii the counsel for the heirs of the testator argued (Rec., p. 19) that the whole trust was void, the duration of the annuities being wholly uncertain, and the subsequent distribution being void for uncertainty and because contrary to the Rule against Perpetuities. They also contended that, even if the trust was not wholly void, the provisions for distribution were void.

The counsel for the executors argued (Rec., p. 21) that the trust for the payment of annuities was good, and gave perpetual annuities; that the gift in distribution was too remote; that the surplus income, beyond what was needed for the payment of annuities, was not disposed of; and that the trustees should be paid only a sufficient fund to provide for the annuities, and the remainder should be distributed immediately to the heirs.

The counsel for the Hawaiian Trust Company, the trustee named in the will, and one of the defendants below, argued that the whole trust was valid; that the payment of the annuities was to last until twenty-one years after the death of the survivor of the annuitants; and that the surplus income was to be accumulated and distributed with the capital at that time.

A question was also raised as to the capacity of the Trust Company to act as trustee under a will.

The Supreme Court of Hawaii sustained the contention of the Trust Company at all points. (Rec., p. 28.) It declined to give instructions as to the method of distribution to be followed at the expiration of the trust for payment of annuities. (Rec., p. 32.)

The heirs have appealed (Rec., p. 39); the executors have not appealed, and therefore cannot be heard against the correctness of the decree below.

The only questions now before the Court are:—

Are the provisions of the trust valid?
Is the surplus income to be accumulated?
Can the Trust Company act as trustee?

If the trust is valid, the Court will not consider now to whom the distribution is to be made at its termination.

Nor can the questions whether the gift of an annuity to a person for life and afterwards to his heirs gives an annuity in fee to the person named, and whether such an annuity is assignable, be considered while the annuitants first named are all alive and in the absence of any assignment by an annuitant. The annuitants, moreover, are not parties to this suit.

If this Court should reverse the decision of the Court below, in whole or in part, questions would then arise as to how the property should be distributed among the heirs, or as to how the surplus income, or a part of the principal representing it, should be distributed.

Even if this Court could consider these latter questions on the present record, it would not do so, but would remit the case to the Supreme Court of Hawaii, in order that that Court might deal with them. None of the assignments of

error (Rec., p. 34) touch on any questions except the three first above mentioned.

At any rate, this appellee is not interested in the decision of these other questions. This is not a bill by this appellee as trustee asking for instructions.

ARGUMENT.

I.

The Trusts which the Testator created are all valid.

They were three:—

A. To pay certain annuities out of the income of the fund.
B. To distribute the whole fund.
C. To hold the fund until the time for distribution.

We do not know that there is any difference between us and the appellants on this point.

To say that the testator did not intend this appellee to take the trust fund on trust to distribute it, is to say that he intended that the trustee should take a legal estate in the residue, which was to continue only as long as the annuities were payable; that then its legal estate should determine; and that, without any act on the trustee's part, the legal estate in the residue should revert to the heirs, and the personalty to the executors for "distribution."

It is impossible to attribute such an intention to the testator. He intended that the trustee should make the distribution. The objections to an opposite view are so many and obvious that it is unnecessary to dwell on them, particularly as we do not understand that the appellants contend for any such view.

The trustee took the whole legal estate in the residue. If the trusts which the testator intended to create, or any of them, are void, then there is a resulting trust for the heirs and next of kin.

A.

The Trust to pay the Annuities.

There is nothing illegal in the grant of an annuity, and an annuity may be for years, for life, or perpetual.

On this matter of the annuities the appellants, if we understand their argument, take alternative views.

First. That the grant of the annuities is bad because the gift over of the principal is bad for remoteness or some other reason.

But the invalidity of a gift over does not affect the validity of an annuity. The annuity will continue up to the time fixed for the bad gift over, or else it will continue forever.

We will not discuss which of these two results would follow from the gift over being held invalid, because we believe the gift over is good.

Second. That the testator has directed that the annuities shall continue as long as legally possible; that it is legally possible that they should continue forever; that the gift over for distribution is therefore obviously too remote, and an accumulation of the surplus income for that distribution would be clearly invalid, and can be stopped at once, in the interest of the heirs and next of kin.

But the testator has not declared that the annuities shall continue as long as legally possible.

He has said that the whole trust, not part of it, shall continue as long as legally possible.

His whole intention must be considered together. He was not establishing two or more entirely separate funds. He was establishing one fund.

Let us take his words: —

"The balance, residue or remainder of my estate is to be placed in trust [not for part of the trust purposes, but for all of them] for as long a period as is legally possible [that is, the *whole* trust is to last as long as is consistent with the execution of the whole trust], the termination or ending of said trust to take place when the law requires it under the statute."

He then goes on to nominate and appoint the Hawaiian Trust Company as trustees of the residue, "and they are to devote sufficient of the annual income derived from the same toward paying the following annuities, which are to be free and clear of all taxes, unto the following persons mentioned [of whom a list is given]. All of the foregoing for life, and then to their heirs, save and excepted [three whose interests are limited to their lives].

"On the final ending and distribution of the trust [*i.e.*, the ending of the whole trust and the distribution of the whole trust fund] the trust fund to be divided" in a certain way.

The testator states his two purposes in establishing the trust fund: the payment of annuities and the distribution of the principal of the fund. The trust is to continue as long as is legally possible, consistently with the accomplishment of these two purposes.

Further, the surplus income not being disposed of during the payment of the annuities, the final gift of the trust fund carries the accumulated surplus income. This is the intention which is presumed in the absence of indications to the contrary, and is also actually in accord with all the indications in this will. On any other theory there would be

an intestacy as to that part of the income. The argument and authorities on this point will be found below, p. 18.

Such an accumulation is legally possible only when the gift of the accumulations becomes vested within the period allowed by the Rule against Perpetuities.

Southampton v. *Hertford*, 2 V. & B. 54, 61.
Boughton v. *James*, 1 Coll. 26, 45.
Gray on Rule against Perpetuities, secs. 671, 674.

The trust as an entirety, therefore, cannot continue beyond that period. But the testator cannot have intended that the payment of the annuities and the accumulation of the surplus income should stop at different times. The gift over of the trust fund is a single gift to take effect at one time, and it must have been intended to include the whole capital and accumulated income in a single distribution.

B.

The Trust for Distribution.

The validity of this trust is the great question in the case. If this trust is for any reason invalid, then the appellants contend that the trust fund, after deducting what may have to be reserved for the payment of the annuities, whatever that may be, has not been disposed of by the testator; and that there is a resulting trust for the heirs and next of kin,—practically an intestacy.

We concede that this proposition is correct; and we also concede that the testator contemplated that there would be a surplus.

But, if the trust for distribution is valid, then the whole fund is to be distributed to the persons indicated.

The Supreme Court of Hawaii decided that the trust for

distribution was valid. We submit that this decision was correct.

The Rule against Perpetuities is in force in Hawaii. This is conceded by both parties. That rule is that a gift to a contingent class or on a contingent event, if the contingency is not one which must happen, if it happens at all, within twenty-one years after lives in being, is bad for remoteness; or, in other words, that the longest period at the end of which it is legally possible that a gift shall take effect is twenty-one years after lives in being.

The words of the testator are "when the law requires it under the statute"; but it is conceded by both parties that either this must refer to Section 1 of the Revised Laws of Hawaii declaring the Common Law to be in force in Hawaii, or the words "under the statute" are to be neglected, and that in either event the Common Law Rule against Perpetuities is to govern in this case.

Further, we concede that the lives to be taken must be ascertainable lives, and that therefore a gift to take effect twenty-one years after the death of all persons living at the death of the testator would not be good. This was said in the leading case of

Thellusson v. *Woodford*, 11 Ves. 112, 134, 136, 146,

and decided in

Re Moore [1901], 1 Ch. 936.

The time set for the distribution is not too remote. It is not too remote, because the testator has expressly said it shall not be too remote; he has said it shall be legally possible. It is a necessary qualification of the time for distribution that it shall not be too remote. Dates which are too remote are expressly excluded by the testator.

But it may be argued that, although the date for distribution cannot be too remote, yet this is the only thing fixed

about the date; that the choice of ascertainable lives from the end of which the twenty-one years is to be calculated is infinite; that the testator has not indicated what the choice is to be; and that therefore the date is uncertain, and the trust for distribution is bad for uncertainty.

Now undoubtedly a devise may be bad for uncertainty; for instance, a devise "to A until twenty-one years after the death of all the following named persons, to wit [and then there is a blank], and then to B." The devise to B is bad for uncertainty.

But that is not this case.

The Supreme Court of Hawaii has held that the testator has sufficiently indicated what lives should be taken, and that those lives were the lives of the persons to whom annuities were given for life. We submit that this is correct.

The choice lies between this and nothing. No one has suggested any other set of lives. The choice is between this and intestacy, and the presumption against intestacy is great.

The lives of the annuitants were all lives in being at the testator's death. That is so, although some of them are described as the children of certain persons.

> "An *immediate* gift to children (*i.e.* a gift to take effect in possession immediately on the testator's decease), whether it be to the children of a living or a deceased person, and whether to children simply or to all the children, and whether there be a gift over in case of the decease of any of the children under age or not, comprehends *the children living at the testator's death* (*if any*) and those only."
>
> 2 Jarman on Wills (6th Am. Ed.), star p. 1010.
> *Scott* v. *Harwood*, 5 Madd. 332.

The lives of the annuitants are the only lives mentioned which can be taken as a measure for the period. The testator indicates them as measuring the period; for his first gifts are

life interests for those lives, and evidently he intended and expected that the payment of annuities should continue for those lives and as long as possible thereafter. The question about which he was in doubt was, how long after the expiration of those lives could the payment be continued? That is the way the question must have presented itself to his mind. The law answers twenty-one years. His imperfectly expressed intention is supplemented by the law, to which he refers, and the result is a designation of a period of the lives mentioned by him *plus* twenty-one years.

It is not essential that the lives taken should be those of persons having an interest in the property, but it is natural; and that there are such lives, and no other lives are mentioned, decisively indicates what lives are to be taken.

There is a case exactly in point, and in our favor. It has never been questioned; and there does not appear to be any authority inconsistent with it.

Pownall v. *Graham*, 33 Beav. 242,

cited at length in Gray on Rule against Perpetuities, sec. 219.

In that case the testator gave his property to trustees to pay the income to his brothers for life, and on the death of the survivor to apply the income for the benefit of "such of my brothers' children as shall appear to them to stand most in need of the same, and that regularly, from year to year, as the law in such cases admits"; and to transfer the principal "after the law, as mentioned aforesaid, admits of no further division among such of my brothers' children as shall appear to my trustees to stand most in need of help or assistance as aforesaid," to the eldest son of his brother Benjamin that might then be living; in case Benjamin's children should be dead, then to the eldest son of another brother, and so on; "and in default of all such issue," then over to the testator's next of kin. The testator's brother

Benjamin was the last survivor of the brothers, and died in 1840. Suit was brought shortly after 1861 by children of other brothers. The defendants were the children of Benjamin, and one of them was the eldest son of Benjamin, who was living twenty-one years after the death of Benjamin. The plaintiffs contended that the trust for the distribution of the income would not expire until twenty-one years from the death of the last nephew or niece who was living at the testator's death.

The opinion by Romilly, M. R., is as follows:—

"The question in this special case is, the period of time during which the trust in favor of the children of the testator's brothers is to endure. The first matter I have to consider is, what is the scheme of this will. There is an estate to the brothers for life, and after the death of the survivor, to their children. If it stopped here, the case would be very simple, and the class would be ascertained at the death of the surviving brother. But after this the net income is to be divided amongst such of the brothers' children as should stand most in need. This class must obviously be ascertained at the death of the surviving brother, at which period all the objects of this trust must necessarily be alive. This trust is to last so long as the law admits, which simply is during twenty-one years after any life in being at the death of the testator. It is obvious, that if this were a gift of the fund to the brothers for life and afterwards to their children, then that the period of division would be the death of the brothers, and from that period the time would run. The law would admit this trust for division amongst the children to go on as long as any person living at the moment of the testator's death was in existence, and during twenty-one years after the life of the longest liver of any person then in existence. But it would be impossible to ascertain when that period would cease, and, if it were, all the children of his brother would probably be then dead, and the gift over would fail of taking effect. I am of opinion, therefore, that it is impossible so to construe it, and that the period from which

the twenty-one years must begin to be calculated is the death of the last surviving brother.

"In no other way can effect be given to this trust, for the testator might have directed it to endure as long as any of the children in a charity school should live and twenty-one years after, but unless he so expressed it, it could not be maintained, as it would be impossible for the trustees to ascertain when the trust ceased. The general scope and object of the will itself gives the explanation. *No one contends that the trust is to go on until the death of everybody in existence at the testator's death, and both parties have referred to the will as being the guide from which the period from which the twenty-one years is to begin to run is to be ascertained.* [The italics are ours.]

"I concur in the argument derived from the decisions in those cases, where realty and personalty are given on similar trusts, with a direction that the personalty shall not vest until twenty-one, and where the Court construes one part of the will by the other.

"Here I see a series of life estates given to the brothers of the testator, and after the death of the survivor, amongst their children. I am of opinion, therefore, that the period at which the twenty-one years is to begin to run is the death of the surviving brother, and when the twenty-one years from that period shall have expired, being the time during which the law admits of the continuance of this trust for division, then the trust for the eldest son of the brother Benjamin then living arises."

So in the present case "the general scope and object of the will itself gives the explanation."

It will be observed that in *Pownall* v. *Graham* the only two constructions suggested as possible in the argument were: first, that the lives of the brothers were to be taken as measuring the period; second, that the lives of all the brothers' children living at the testator's death were to be taken for that purpose. No one argued that the Court would have to go outside of the will and take the lives of all persons living in the world, and that therefore the trust was

void. Indeed, they could not so argue, and for the same reason that governs this case, because the testator had expressly declared, as the testator in this case has expressly declared, that the date for payment over should be one that the law allowed, and twenty-one years after the death of all persons living at the testator's death the law would not allow.

The counsel on each side in *Pownall* v. *Graham* was contending for what would have been a valid trust. Neither counsel nor court had any doubt that they could not go outside of the will in the choice of lives.

Nor had they any doubt that the lives to be taken were those of persons to whom the testator had given interests.

And that makes the case identical with ours. In *Pownall* v. *Graham* there were two sets of persons in the will. No one doubted that the period must be measured by the lives of one of those sets of persons, the question being which was to be taken.

But in our case no such question arises, for in Mr. Galbraith's will there is only one set of persons.

In *Pownall* v. *Graham*, as in our case, the gift over might have taken effect at too remote a time except for the clause referring to the requirements of the law, for the gift over might give the fund to a child born after the testator's death, and so would be too remote unless confined within the limit of the rule. It was that clause which caused the gift over to be construed in such a manner as would make it valid within the rule. The terms of the gift over were important only as pointing out one set of beneficiaries, rather than the other, as those whose lives were to be selected.

There is an interesting class of English cases, referred to in the opinion of Lord Romilly, above quoted, which deal

with bequests of personal property to go "as heirlooms," or along with certain real property, "as far as the rules of law and equity will permit." One of the leading cases is *Shelley* v. *Shelley*, L. R. 6 Eq. 540. In that case there was a bequest of jewels to the testatrix's nephew John to go and be held by him as heirlooms, and by his eldest son on his decease, and to descend to the eldest son of such eldest son, and so on, "as far as the rules of law and equity will permit. And I request my said nephew to do all in his power, by will or otherwise, to give effect to this my wish as to these things so directed to go as heirlooms as aforesaid." The Court held that, by virtue of the sentence last quoted, the testatrix created a trust providing that the property should go in the manner she had directed.

> "It would not be a reasonable way of framing the limitations to take, as was suggested by Sir Roundell Palmer, the fantastical method of saying that so long as all the people now in existence are alive the limitations shall exist. What the testatrix says is that she does not know how to frame any limitation to the objects of her bounty, but what she wishes is that it shall be continued to the objects of her bounty so long as the rules of law and equity will permit. All that one has to do is to settle the jewels to John for life, with remainder to Edward [the eldest son] for life, with remainder to his eldest son or only child for the time being who shall attain the age of twenty-one," etc.
>
> *Shelley* v. *Shelley, ubi supra*, at p. 548.

Shelley v. *Shelley* was followed and approved in

Re Johnston, 26 Ch. D. 538, 546.

The cases are collected in Gray on Rule against Perpetuities, sec. 363–367.

What these cases all show, for they are all alike in this respect, is that a gift, "as far as the rules of law and equity will permit," is not bad for uncertainty, and that the period

to be taken is to be determined from the consideration of the will. The cases are therefore strong authority for our view.

As in these cases the land was always settled in tail, and there can be no estates tail in personalty, what have the cases all done? They have given life interests in the personalty to all the persons to whom life estates in the realty have been given, and they have given an absolute interest in the personalty to the first tenant in tail of the realty. So far the cases have all agreed. But then this point has come up: If a tenant in tail dies under twenty-one without leaving issue at his death, the realty goes to the next tenant in tail: now shall there be a corresponding limitation of the personalty, in case the first taker of the absolute interest dies under twenty-one without leaving issue? There is no difference of opinion that the testator could have made that limitation over, had he wished. The question is: On the construction of the will did he do it?

On this question of construction there has been much difference of opinion. Fine distinctions have been made on the circumstance whether the trust was executed or executory, or on the special words of the devise; and the line of decision has not been entirely consistent. All this is immaterial for our case. But what is material for our case is that in this whole series of decisions three things stand out clear.

First. That a gift, "so far as the rules of law and equity will permit," is not bad for uncertainty.

Second. That its meaning is to be determined within the four corners of the will.

Third. That the lives by which the period is to be measured are the lives mentioned in the will.

That exactly covers our case.

It will be enough to refer particularly to one of the recent and best-considered cases. In *Harrington* v. *Harrington,*

L. R. 3 Ch. 564, L. R. 5 H. L. 87, a testator bequeathed certain chattels

"In trust for the person and persons who for the time being shall [under certain limitations of a mansion-house and other real estate] be in the actual possession of the same mansion-house and estates, to the end and intent that all and singular such [chattels] may be deemed and considered as heirlooms to go along and forever be used and enjoyed with, the same mansion-house and estates, so far as the rules of law or equity will permit" with a proviso that they should not vest absolutely in a tenant in tail unless he should attain twenty-one.

In the Court below Lord Cairns said (L. R. 3 Ch. at 574):—

"But it is to be observed that the declared intention of the testator is not to join the chattels to the real estate absolutely, but only so far as the rules of law and equity will permit, and although these words will not correct a gift which in terms infringes the rule against perpetuity, they may be fairly referred to when a construction warranted by the words used is impugned on the score of inconsistency with the intention of the testator."

In the House of Lords (L. R. 5 H. L. 87, at 105, 107) Lord Cairns said:—

"Reading the bequest in this way, and omitting, as I have done, the words '*so far as the rules of law and equity will permit*,' it would be difficult to avoid applying to it the principles acted upon by this House in *Lord Dungannon* v. *Smith*." (In which case the whole bequest was held void on the score of remoteness.) (p. 105.)

"But I am of opinion that there is no sound principle on which the generality of the trust, 'for the persons who shall for the time being be in the actual possession of the estates' can be explained and limited, except by the limit to be derived from the words which I have hitherto purposely omitted, 'to the end and intent that the (chattels) may be considered as heirlooms, to go along

and forever be used and enjoyed with the same mansion-house and estates, so far as the rules of law and equity will permit.'

"Lord Hardwicke was of opinion, in the cases of *Gower* v. *Grosvenor* and *Trafford* v. *Trafford*, that words of this kind made a trust of chattels an executory trust and not a direct gift; and that a Court of Equity might execute the trust according to the general intent of the testator, and, even without any direction to that effect, carry over the chattels, within certain limits, on a tenant in tail dying under twenty-one. These decisions are commented on, and the subsequent decisions to the contrary collected, by Lord Cottenham in *Rowland* v. *Morgan*, who regretted, as many others [*e.g.*, Lords Eldon and Westbury] have done, that Lord Hardwicke's views had not been followed. None, however, of these authorities opposed to Lord Hardwicke's opinion has doubted, indeed all have assumed, that a general trust of chattels to go with settled estates, or to be held by persons for the time being entitled to the possession of settled estates, *as long as the rules of law and equity would permit, would be effectual, and effectual by reason of those particular words*, [the italics are ours] to carry the chattels to the first person with an estate of inheritance." (p. 107.)

In *Hill* v. *Hill* [1902], 1 Ch. 807, at 813, Vaughan Williams, L. J., said, referring to *Harrington* v. *Harrington*:—

"But that case turned upon a proviso preventing the personalty from vesting absolutely in a tenant in tail unless he should attain twenty-one, and it was contended that the proviso had the effect of carrying on to those who came next in remainder after the taker on the determination of the life estate, so exposing itself to be rendered void as aiming at perpetuity; but the House of Lords held that the proviso was an essential part of the gift, and therefore controlled by the words in the dispositive clause, 'so far as the rules of law and equity permit.' The effect of this was to limit the proviso so as that it should only apply to tenants in tail who took by purchase, and consequently it could not be said that the proviso was void as aiming at perpetuity."

As we have said, the number of lives to be taken, in applying the Rule against Perpetuities, must be an ascertainable number, that is, as was said in the leading case of *Thellusson* v. *Woodford*, 11 Ves. 112, 134, 136, 146, the number of lives chosen must not be more than will admit of making out, by reasonable evidence, at what time the survivor ceases to exist. Provided the termination of the lives can be determined by reasonable evidence, their number is immaterial. In our case there are forty-one lives. In *Cadell* v. *Palmer*, 1 Cl. & F. 372, there were twenty-eight lives. In *Humberston* v. *Humberston*, 1 P. Wms. 332, cited in *Thellusson* v. *Woodford*, 11 Ves. 112, 135, there were about fifty life estates.

In this case not only can the trustee ascertain when the life interests have ended, but it is a necessary part of the trust: it is the trustee's duty to ascertain when they end. The trustee is paying out the annual income to those having life interests. On the death of each of these life tenants the trustee has *ex necessitate rei* to stop making payments to them. For its own protection, and as in duty bound by the very terms of the trust, it has got to keep track of them.

C.

The Trust to hold the Fund and accumulate the Surplus Income.

If the trust for distribution is sustained, there arises another question: What is to be done with the surplus of the income accruing before the time of distribution? Is it to be accumulated? We contend that it is to be accumulated.

What the record shows with regard to the probable income from this property is that there is real estate, almost all in one parcel which is under lease until 1950 at a rent of $10,000 a year; and that there will be, after payment of legacies, a residue of $80,000 or $90,000 personalty. (Rec.,

pp. 3, 17.) A very small portion of both the real and the personal estate is in Ireland. (Rec., p. 3.) The amount of the annuities is $8,350 a year. (Rec., p. 18.) Whether there will continue to be a surplus until the expiration of twenty-one years after the death of the survivor of the life annuitants, no one can say. It may be admitted, however, that there will be some surplus in the immediate future, and that it appears from the words of the will, as well as the circumstances, that the testator was aware that there would be surplus income.

The question is whether that surplus income shall be accumulated, and distributed as part of the trust fund, when the time for distribution has arrived, or shall be treated as undisposed of, and paid to the testator's heirs and next of kin.

The gift in distribution in this case is a gift of a residue of real and personal estate to take effect at a future time.

In the case of a residuary devise of real estate to take effect at a future time, where the intermediate rents are not expressly disposed of, they go to the heirs as intestate property.

In the case of a residuary legacy of personalty to take effect at a future time, any intermediate income not expressly disposed of goes to the legatee when he receives his legacy, as an accretion to the principal.

When there is a residuary gift of both real and personal estate, included in one gift, the intermediate income from both the real and personal property is accumulated in the same manner as if it were from personalty alone.

No rules in the law are better settled or more unquestionable than these.

Genery v. *Fitzgerald*, Jac. 468.
Re Dumble, 23 Ch. D. 360, 365.
Hurford v. *Haines*, 67 Md. 240.
McKee's Appeal, 96 Pa. St. 277, 284.
Cochrane v. *Schell*, 140 N. Y. 516, 537.

"When personal estate is given to A at twenty-one, that will carry the intermediate interest. If a testator gives his estate *Blackacre* at a future period, that will not carry the intermediate rents and profits. But when he mixes up real and personal estate in the same clause, the question must be, whether he does not show an intention, that the same rule shall operate on both. Here the property was partly real, partly personal, and partly of such a description that the testator does not seem to have known whether it was real or personal. He does not by his will create any trust, but makes a legal devise and bequest of the whole together: then is not the weight of authority in favor of the proposition, that when real and personal estate are given in this way, the intermediate profits of both must go together? I think it is, and the decree [which was for accumulation] must therefore be affirmed."

Lord Eldon in *Genery* v. *Fitzgerald*, Jac. 468.

"If you find in one and the same clause in a will a gift of realty and personalty to go together to the same objects, then the rule is, that, if there are intermediate rents of the realty and intermediate income of the personalty which are not expressly disposed of, the rule with regard to personalty is followed, and the rents of the real estate must be accumulated in the same way as the income of the personal estate, so as to go to the person who ultimately becomes entitled to the two funds."

In re Dumble, L. R. 23 Ch. D. 360, 365.

"There is no principle better settled than that a general residuary bequest of personal property, contingent in terms, carries the intermediate income or interest, and that such income or interest will be required to accumulate and form part of the residue for the benefit of the party that may be ultimately entitled to such residue. This is the settled doctrine, upon all the authorities. . . . That being the rule in regard to executory bequests of residue of personal estate, the rule is equally well settled that a blended gift or devise of a residuary real and personal estate, though contingent in terms, carries the inter-

mediate rents and profits of the real estate, as well as the income of the personal estate."

Hurford v. *Haines*, 67 Md. 240, 244.

It was suggested by counsel below that this was the rule only in case of vested, and not of contingent, estates. But this is not so. This rule applies both to contingent and vested future estates. In the English cases above cited, and in *Hurford* v. *Haines*, the estates were contingent. In *Cochrane* v. *Schell* the Court declared it unnecessary to decide whether the estate was vested or contingent. But the language in that case, as well as in *Hurford* v. *Haines*, expressly included contingent estates. In *Cochrane* v. *Schell* and *McKee's Appeal* it should be noted that the accumulations were partly invalid by statute.

Where real and personal estate are given together as one fund, there arises a very strong presumption that they are to be treated alike, and the Court will treat them both as if they were personalty; because the rules of construction as to the disposition of personalty, where they differ from those regarding realty, are always less artificial and more apt to conform to the testator's real intention.

The application of this principle in the present case is merely an instance of a general rule. A construction should be adopted which will make realty and personalty go together, where the testator has treated them as one fund.

Abbot v. *Essex Co.*, 18 How. 202, 216.

So also the rule that the intermediate income of future gifts of personalty or mixed funds will be accumulated is a consequence of the rule that courts will prefer a construction which prevents a partial intestacy.

"The law prefers a construction which will prevent a

partial intestacy to one that will permit it, if such a construction may reasonably be given."

Given v. *Hilton*, 95 U. S. 591, 594.
Kenaday v. *Sinnott*, 179 U. S. 606, 616.

Compare Revised Laws of Hawaii, sec. 2531.

"*Presumption against intestacy.* Every devise, purporting to be a devise of all the real or personal estate of the testator, shall be construed to convey all the real or personal estate belonging to him at the time of his decease, unless it shall clearly appear by the will that he intended otherwise."

This presumption against intestacy is particularly strong in cases where it appears that the testator actually contemplated the existence of the interest which he fails to expressly dispose of. Here he contemplated the existence of surplus income; for he speaks of devoting "sufficient of the income" to paying the annuities. Also several of the annuities are for life only, and on their termination a portion of the income is released.

In this will there is nothing to rebut the presumption against intestacy. The testator has worked out the disposition of his estate in the most careful and detailed way, so far as he could with his defective knowledge of the law. He gives all the "balance, residue or remainder" of his estate to trustees to establish a "trust fund." There is no doubt that all the income belongs in the first place to the trustee; so that what the heirs claim is not literally an intestacy, but a resulting trust as to part of the income. At the time of distribution he directs that the trust fund be divided. In directing a distribution, he does not repeat the words "all the balance, residue and remainder of my estate" which he used in the gift to the trustee, but he says "the trust fund" shall be divided. This naturally includes the accrued income as

well as the principal. As fast as the income is received, it becomes as much a part of the trust fund as the principal.

See *Minot* v. *Tappan*, 127 Mass. 333, 337.
Re Travis [1900], 2 Ch. 541, 548.

Suppose the provision as to the annuities had been left out, and the will read: "The residue of my estate is to be placed in trust for as long a period as is legally possible. On the final ending of the trust, the trust fund is to be divided equally among A, B, and C." Would not this be a trust for accumulation, and the trust fund be deemed to include accrued income as well as principal? In a case where the existence of unused income is contemplated, provisions for a partial use of the income cannot alter the meaning.

The testator's main purpose was to keep the whole estate in the hands of a trustee for as long as was possible consistently with an ultimate division of the whole. The usual legal construction, for which we contend, effects this purpose, and finally gives the surplus income to the beneficiaries under the trust, the persons whom the testator wished to benefit, and in the proportions in which he wished to benefit them.

The appellants may address an argument to this Court, as they did to the Court below, based on the supposed magnitude of the accumulations which may take place. It is unnecessary to remark that such an argument is without force. In the words of Chief Baron Macdonald, in giving the opinion of the judges in the House of Lords, in the case of *Thellusson* v. *Woodford*, 11 Ves. 112, at 142:—

> "I do not trouble your Lordships with any observations upon the objections arising from the magnitude of the property in question; either as it now stands, or may hereafter stand. . . . That would be to suppose, that such topics can in any way affect the judicial mind."

In that case, after the most thorough possible argument, in which the supposed impolicy of great accumulations was most vehemently urged upon the Court (see Mr. Hargrave's argument, note, 4 Ves., at 247), not one of the judges had the slightest doubt that accumulation was lawful to any extent or for any period, except as limited by the operation of the Rule against Perpetuities.

The Thellusson Act (39 and 40 Geo. III., c. 98), which was passed in consequence of that case, is not re-enacted in Hawaii; nor does it apply to Ireland.

Freke v. *Carbery*, L. R. 16 Eq. 461.
Lewin on Trusts (11th Ed.), p. 99.

There is nothing in the record to show definitely what the income of the estate is, even at the present time; nor any evidence of accountants to show what the amount of the accumulations would be on any theory.

The vast accumulation of the trust fund in the Thellusson case, which was contemplated with such dismay, did not in fact take place. See note in 4 Ves., at 227.

We will merely remark, in order to rebut any presumption that we admit the accuracy of any figures as to the probable accumulations which the appellants may choose to state, that, assuming the data which the appellants assumed in their argument in the Court below, we reach a very much smaller total. Taking a surplus income of $8,000 a year (which we do not admit will exist) and a possible period of accumulation of eighty-one years, at four per cent. compound interest, with annual rests, we believe, on the information of accountants, that the amount of the accumulations would be $4,594,358.

II.

The authority of the Hawaiian Trust Company to act as Trustee under this Will.

For three reasons, each of which is separately sufficient, the appellants cannot impugn here the authority of the Hawaiian Trust Company to take this property and execute the trust.

A.

Any lack of authority in this Trust Company to act as trustee would have no effect on the validity of this trust. Another trustee would be appointed by the Court having jurisdiction for that purpose in Hawaii. The heirs or next of kin would get no interest in the trust fund.

Vidal v. *Girard*, 2 How. 127, 188.

B.

No private person has a right to object to a corporation's taking or holding any property on the ground that its charter does not authorize it to do so.

Vidal v. *Girard*, 2 How. 127.
Bank v. *Matthews*, 98 U. S. 621.
Fritts v. *Palmer*, 132 U. S. 282, 293.

"And if the trusts were themselves valid in point of law, it is plain that neither the heirs of the testator, nor any other private persons, could have any right to inquire into, or contest the right of the corporation to take the property, or to execute the trusts."

Vidal v. *Girard*, 2 How. 127, 191.

C.

The Hawaiian Trust Company is authorized to take this property and execute the trust.

1.

The laws of Hawaii, 1890, c. 43, sec. 1, as amended by Laws, 1896, c. 39, sec. 1; Revised Laws of Hawaii (1905), sec. 2535, is as follows:—

> "*Joint stock companies.* Joint stock companies, for the purpose of carrying on any business or undertaking, either mercantile, agricultural or manufacturing, or buying, selling, leasing or otherwise dealing in real estate and buildings and other structures, whether used or intended to be used as shops, stores, ware-houses, offices, boarding and lodging houses, hotels, or otherwise, for which individuals may lawfully associate themselves (excepting banking and professional business) shall be incorporated in the following manner and in no other."

The Hawaiian Trust Company was organized under this statute in 1898, by Articles of Association (Rec., p. 11) which expressly authorized it not only to act as trustee, but also to carry on the businesses of collecting rents and income; buying, selling, issuing, registering or transferring stocks and bonds; lending money; receiving articles on deposit for safe-keeping; renting safes; acting as surety on bonds; insuring titles; and acting as agent for Fire, Life and Accident Insurance Companies.

The business of acting as trustee, and all the other businesses set forth in these Articles of Association (except perhaps what might fall within the description of banking), were within the scope of the section of the Joint Stock Companies Act above quoted. They are all "mercantile" busi-

nesses in the broad sense in which the word was therein used. Unless "mercantile" is given a broad sense, the exception of "banking and professional business" is absurd; for professional business would not be included in mercantile business if the latter term were narrowly interpreted. Certainly the business of acting as trustee is more properly a mercantile business than is any professional business, such as that of a lawyer or doctor. The express exclusion of professional business therefore shows the broad sense in which the general term "mercantile" must have been employed, and implies the inclusion of other businesses which are at least as much mercantile as those expressly excluded.

The Act was intended to authorize the formation of joint stock companies for any business for which individuals might lawfully associate themselves, except banking and professional business. This has been expressly decided by the Supreme Court of Hawaii.

Hackfeld v. *King*, 11 Haw. 5.

2.

Even if the Hawaiian Trust Company was not originally authorized to undertake the business of acting as trustee, it nevertheless was validly organized to do some of the other sorts of business set forth in its Articles of Association. Some of these, at least, were clearly mercantile. It was an existing company, engaged in business which, in part at least, it was authorized to do.

The Session Laws of Hawaii, 1905, c. 69, "The Trust Company Act," contains the following provisions:—

> SEC. 1. "'Trust Company' as used in this act, means any corporation or joint stock company organized or which may hereafter be organized under the general laws of the territory of Hawaii, which has obtained from the

Treasurer of the Territory a certificate that it is qualified to act as a Trust Company under section 2 of this Act."

SEC. 2. "No corporation or joint stock company shall do business as a Trust Company except on the following conditions." . . .

"(*b*) It shall be organized for the purpose of doing business as a Trust Company, and such object shall be expressed in its charter or articles of association."

SEC. 4. "Every Trust Company shall have power, in addition to the general powers conferred by law upon corporations and joint stock companies:

"(1) To take, receive and hold, and repay, reconvey and dispose of any effects and property, both real and personal, which may be granted, devised, bequeathed, committed, transferred or conveyed to it, upon any trust or trusts whatsoever, at any time or times by any person or persons, including married women and minors, body or bodies corporate, or by any State, Territorial, Federal or Foreign Court or Judge, and to administer, fulfil and discharge the duties of such trust or trusts for such remuneration as may be agreed upon or provided by law."

The Hawaiian Trust Company has obtained the required certificate. (Rec., p. 13.)

The passage of this statute, and the issuing of a certificate under it, authorized the Hawaiian Trust Company to act as trustee in the future, whether or not it had been authorized so to act in the past. It is immaterial that this statute was passed after the death of the testator, for it has taken effect before the transfer of the property by the executors to the trustee, and before the trustee has undertaken actively to execute the trust.

JOHN C. GRAY,
ROLAND GRAY,
Of Counsel.

FITCHIE *v.* BROWN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 47. Argued October 29, 30, 1908.—Decided December 7, 1908.

Executors, parties to the action but who have not appealed, cannot be heard against a decree construing the will and determining the validity of trusts on an appeal taken by other parties.

The common law having been made applicable by statute in Hawaii, and there being no other statute regulating the subject, trusts must be valid as at common law; and the utmost extent of a testamentary trust is limited by ascertained lives in being at the time of its creation, selected by the testator but not necessarily having an interest in the property, and for twenty-one years after the death of the last survivor which must be ascertainable by reasonable evidence.

The testator's intent is to be sought and carried out if not illegal; and although the persons whose lives are to limit a trust may not actually be so designated in the will it is sufficient if a class or number of lives are referred to so as to plainly indicate that they were selected for that purpose.

A testamentary trust to continue as long as possible "under the statute" is not void, because in Hawaii there is no statute and the common

law is applicable; the testator's intent being evident that the trust was to continue as long as legally possible.

The fact that the class limiting the duration of a common-law trust is large—in this case over forty—does not render it void if it is otherwise legal.

A trust created for as long a period under the statute as possible *held* legal at common law and to be limited by the lives of annuitants mentioned in the will and evidently intended, although not so specified, by the testator as being the lives selected for the duration of the trust and twenty-one years after the death of the last survivor.

Where there are a number of annuitants constituting a class selected to determine the duration of a common-law trust, the fact that there is a corporation among them will not render the trust illegal, as creating a perpetuity; the annuity to the corporation will cease on the expiration of the trust twenty-one years after the death of the last surviving individual annuitant.

In this case, surplus income, after paying specified annuities, should be accumulated until the termination of the trust and then distributed as part of the estate to those entitled thereto under the will.

Whether or not a trustee named in a will can act as such does not affect the validity of the will; in case he cannot act the court can appoint a trustee to carry out the provisions of the trust.

18 Hawaii, 52, affirmed.

THE parties to this proceeding agreed upon a case, without action, containing the facts upon which a controversy had arisen between them, and submitted the same to the Supreme Court of the Territory of Hawaii, conformably to the laws of that Territory.

The court heard the case and made a decree therein, from which those named above as plaintiffs in the submission have appealed to this court, but the defendant executors have not appealed.

From the agreed statement of facts contained in the submission it appears that one George Galbraith, who died at Honolulu on the fifth of November, 1904, while domiciled in the Territory of Hawaii, left a will, which has been duly admitted to probate in Hawaii, disposing of an estate of about $121,000 in personal property and $128,000 in real estate in Hawaii, and a small amount of real estate in Ireland.

The will gave some pecuniary legacies to a number of people, relatives and friends, and then provided that—

"The balance, residue or remainder of my estate is to be placed in trust for as long a period as is legally possible, the termination or ending of said trust to take place when the law requires it under the statute.

"I hereby nominate and appoint the Hawaiian Trust Company, Limited, of Honolulu, Territory of Hawaii, as trustee of the aforesaid balance, residue or remainder of my estate and they are to devote sufficient of the annual income derived from the same toward paying the following annuities, which are to be free and clear of all taxes, unto the following persons mentioned, namely," [here follow the names of the annuitants and the amounts which they are to receive yearly].

"All of the foregoing for life, and then to their heirs, save and excepted the last three persons, namely, Josie Fink, Emma Douglass and Matilda Bailey, who are to receive only their life annuities and at their death all their interests to cease.

"On the final ending and distribution of the trust, the trust fund to be divided equally amongst those persons entitled at that time to the aforementioned annuities."

On the same day the testator made a codicil, in which he made some changes of the annuities, substituting for the annuity given to the seven children of Hugh Galbraith, of $2,520 annually, an annuity to the same children of $2,100 yearly for life, and then to their heirs.

The testator also bequeathed by the codicil an annuity to the Kona Orphanage of Kona of $100 yearly, "under the same conditions as the other annuitants mentioned, save and excepted, Hugh Galbraith, Josie Fink, Emma Douglass, and Matilda Bailey."

Upon the above facts several questions arose and were submitted to the court below, among them one which relates to the validity of the trust and another to the disposition of the surplus income remaining after the payments to the annuitants mentioned in the will.

The Supreme Court of Hawaii ordered a decree to be entered, which declared that the will of George Galbraith established a valid trust, and that the Hawaiian Trust Company, Limited, a corporation, the trustee named in the will, was legally authorized to administer the trust; that under the trust it was the duty of the trustee to pay out of the income of the trust property the annuities payable by the provisions of the will to the four persons named therein for their respective lives and for the payment of the other annuities payable by the will to the other annuitants therein named for and during their respective lives, and thereafter to pay the same to their heirs respectively until the end of twenty-one years after the death of the last survivor of all the said annuitants, and during the same period of time to pay to the Kona Orphanage the annuity directed in the will, and at the end of said twenty-one years to divide the trust fund and its accumulated and unapplied income as required by the direction in that behalf contained in the will.

Mr. Aldis B. Browne, with whom *Mr. W. L. Stanley*, *Mr. Henry Holmes* and *Mr. Alexander Britton* were on the brief, for appellants:

The trust for final distribution—"on the final ending and distribution of the trust, the trust fund to be divided equally amongst those persons entitled at that time to the aforementioned annuities"—is invalid because there is no direction in the will as to when it is to take place, to which effect can be given.

The words in question would not have the effect of fixing the time for the termination of the annuities and the payment over of the *corpus* at the end of twenty-one years after lives in being.

As to what is the effect of inserting such words, and the absence of any general rule on the question, see *Shelley* v. *Shelley*, L. R. 6 Eq. 540; *In re Johnston*, L. R. 26 Ch. D. 538; *Sackville-West* v. *Viscount Homesdale*, L. R. 4 Eng. and I.

App. Cas. 543; *Harrington* v. *Harrington*, L. R. 5 Eng. and I. App. Cas. 87, 105–107; *Hill* v. *Hill*, L. R. (1902) 1 Ch. Div. 537, 807; *In re Moore*, L. R. (1901) 1 Ch. Div. 936; *In re Exmouth*, L. R. 23 Ch. Div. 158; *Lord Scarsdale* v. *Curzon* (1860), 1 J. and H. 40; *Davies* v. *Davies*, 36 Ch. Div. 359, 380, 387, 392; *Tollemache* v. *Earl of Coventry*, 2 Cl. and Fin. 611; *Pownall* v. *Graham*, 33 Beav. 242.

Galbraith's will does not dispose of heirlooms; it does not contain any such referential trust, nor does it contain any executory trust, because if anything is clear as to the effect of the words in question, it is that they do not in themselves make the trust executory. 1 Perry on Trusts (2d ed.), par. 359; *Harrington* v. *Harrington*, *supra*; *Hill* v. *Hill*, *supra*.

There is no ground for saying that the trust is executory, and therefore the court will mold the limitations; and it is only by ignoring the fact that the above are cases of referential trusts, executory trusts, or trusts in which the lives to be taken are pointed out by the testator, that they can be considered as having any bearing on the case before the court. All these cases are English. The policy of the law of Hawaii, where estates tail are illegal (12 Hawaii, 375), does not require this court actually to go beyond the cases decided in England where estates are entailed to support hereditary titles and rights.

But if the words in question could have the effect of fixing the time for the termination of the annuities and the payment over of the *corpus* at the end of twenty-one years after lives in being, still the testator cannot be taken to have selected the lives in question, or any lives. There is no necessary presumption either by force of the common law or by the terms of the will, as compared with other wills which have been the subject of judicial decision, that the lives of the named annuitants, or any lives, were selected by the testator. Hawkins on Wills, 1; *Scale* v. *Rawlins*, L. R. (1892) App. Cas. 342, 343; *Pownall* v. *Graham*, 33 Beav. 242, discussed and distinguished.

To hold that Galbraith's will directs that the lives of all of

the "forty odd" annuitants are to measure the lives in being, would still make the trust void for remoteness, because it will tend to a perpetuity, as the extinction of forty odd lives is more than can be made out by reasonable evidence or without difficulty. *Thellusson* v. *Woodford*, 4 Ves. 290; *S. C.*, 11 Ves. 136; Gray, Rule against Perpetuities, § 218.

Mr. John C. Gray, with whom *Mr. Roland Gray* was on the brief, for the Hawaiian Trust Company, an appellee.

There is nothing illegal in the grant of an annuity, and an annuity may be for years, for life or perpetual.

The invalidity of a gift over does not affect the validity of an annuity. The annuity will continue up to the time fixed for the bad gift over, or else it will continue forever. But this is not material, as in this case the gift over is valid.

The whole intention of the testator must be considered together. He was not establishing two or more entirely separate funds. The testator states his two purposes in establishing the trust fund: the payment of annuities and the distribution of the principal of the fund. The trust is to continue as long as it is legally possible, consistently with the accomplishment of these two purposes.

Further, the surplus income not being disposed of during the payment of the annuities, the final gift of the trust fund carries the accumulated surplus income. This is the intention which is presumed in the absence of indications to the contrary, and it is also actually in accord with all the indications in this will. On any other theory there would be an intestacy as to that part of the income. Such an accumulation is legally possible only when the gift of the accumulations becomes vested within the period allowed by the rule against perpetuities. *Southampton* v. *Hertford*, 2 V. & B. 54, 61; *Boughton* v. *James*, 1 Coll. 26, 45; Gray on Rule against Perpetuities, §§ 671, 674. The trust as an entirety, therefore, cannot continue beyond that period. But the testator cannot have intended that the payment of the annuities and the accumulation of the

surplus income should stop at different times. The gift over of the trust fund is a single gift to take effect at one time, and it must have been intended to include the whole capital and accumulated income in a single distribution.

The trust for distribution is valid. The devise is not bad for uncertainty. The testator has sufficiently indicated what lives should be taken, and those lives were the lives of the persons to whom annuities were given for life. On this branch of the case see *Pownall* v. *Graham*, 33 Beav. 242; *Shelley* v. *Shelley*, L. R. 6 Eq. 540; *Re Johnston*, 26 Ch. Div. 538, 546; Gray on Rule against Perpetuities, §§ 363–367; *Harrington* v. *Harrington*, L. R. 3 Ch. Div. 564; *S. C.*, L. R. 5 H. L. 87; *S. C.*, L. R. 3 Ch. 574; *S. C.*, L. R. 5 H. L. 87, 105, 107; *Hill* v. *Hill*, 1 Ch. Div. 807, 813.

If the trust for distribution is sustained, the surplus of income accruing before the time of distribution is to be accumulated. On this point see *Genery* v. *Fitzgerald*, Jac. 468; *Re Dumble*, 23 Ch. Div. 360, 365; *Hurford* v. *Haines*, 67 Maryland, 240; *McKee's Appeal*, 96 Pa. St. 277, 284; *Cochrane* v. *Schell*, 140 N. Y. 516, 537; *Abbot* v. *Essex Co.*, 18 How. 202, 216; *Given* v. *Hilton*, 95 U. S. 591, 594; *Kenaday* v. *Sinnott*, 179 U. S. 606, 616; *Minot* v. *Tappan*, 127 Massachusetts, 333, 337; *Re Travis*, 2 Ch. Div. 541, 548.

Mr. Clarence H. Olson, with whom *Mr. William O. Smith* and *Mr. A. Lewis, Junior*, were on the brief, for Cecil Brown and William O. Smith, Executors, appellees.[1]

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court.

In the view we take of the case there are but two questions necessary to be noticed, and they involve the validity of the trust and the disposition of the surplus income. The appel-

[1] See statement in opinion as to right of the executors' counsel to be heard, *post*, p. 328.

lants, who are the heirs of testator, insist, first, that the provision in the will for final distribution, ordering the trust fund to be divided equally among those persons entitled at that time to the annuities mentioned, is invalid, because there is no direction in the will as to when it is to take place, and therefore effect cannot be given to it; that the only direction in the will as to the duration of the trust is contained in the words "the residue . . . to be placed in trust for as long a period as is legally possible, the termination or ending of said trust to take place when the law requires it under the statute." Unless there is contained in those words a direction as to the duration of the trust, or, in other words, a direction as to the period at which that part of the trust which consists of the payment of annuities is to cease, and that part which consists of the distribution of the capital is to take place, then, it is contended, the duration of the trust has not been sufficiently declared by the testator, and the trust is one which the court cannot carry out; second, that if the above words do constitute a direction as to the duration of the trust, yet still the testator has not selected the lives in being which are to be taken as a limitation of the trust; third, that even if the testator had selected the lives consisting of all the annuitants mentioned, they are more than forty in number, and the trust is void, because it would then tend to a perpetuity, as the extinction of more than forty lives is more than can be made out by reasonable evidence or without difficulty, it being quite impracticable to ascertain when the last of more than forty lives would be extinguished.

The counsel for the executors of the testator, appellees herein, was permitted in this court to file a brief and was heard orally on the argument before us, although no appeal from the decree had been taken by the executors, this court stating, however, that it would thereafter decide whether counsel for executors had any right to be heard to contend against the decree of the court below.

Counsel, in fact, did argue against some parts of the decree,

contending that the trust was valid in so far as it provided for the payment of the annuities specified, but that the provision for final distribution was void, and that the annuities succeeding to and other than the life annuities were perpetual, and that there was an intestacy as to that not required to satisfy all the annuities.

We are of opinion that counsel for the executors had no right to appear and be heard against the decree, no appeal having been taken from it by his clients.

The trustee contends that the whole trust is valid, and that the surplus income over the amount necessary for the payment of the annuities mentioned must be accumulated up to the time of the general distribution under the trust, as provided for in the will, and that such surplus shall then be distributed as part of the trust fund to the persons then entitled to that fund.

Our first inquiry is, Was this trust valid as a whole? It is conceded by all that the common law is applicable, and that there is no statute in Hawaii governing the subject, except the statute making the common law applicable there, and that the utmost extent of a trust at common law is limited by lives in being at its creation and for twenty-one years thereafter; that the lives must be selected by the testator in his will; that they must be ascertained lives, *i. e.*, lives that can be distinguished, and the fact of the death of the last survivor must be capable of being made out by reasonable evidence [*Thellusson* v. *Woodford*, 4 Ves. 227; *S. C.*, 11 Ves. 134, 146; *In re Moore* (1901), 1 Ch. 936], and the selected lives need not be those having an interest in the property. *Moore's Case* is an example of a void limitation on the ground of uncertai y. The limitation was measured by twenty-one years from the death of the last survivor of all persons living at the death of the testatrix.

A perusal of the will shows that the testator did not in so many words name the persons whose lives the trustee contends he selected for the limitation of the trust.

However, if the scheme of the will, discoverable from its provisions, be such that a plain implication arises from those provisions that a certain class or number of lives mentioned, or referred to, in the will were selected by the testator for a limitation of the trust, such implied selection is sufficient. It is the intention of the testator that is to be sought, and such intention is not always found to have been directly, and in so many words, expressed in the will. An intention, which is implied from language actually used and from facts actually appearing in the will, is to be carried out, provided it does not violate the law. An intention so implied is as good as an intention more plainly and in direct terms expressed. The question is, therefore, whether the testator, by an implication arising from the language used in the will and the facts therein appearing, selected those lives by which the trust is to be limited.

Looking at the will, it is seen that a trust is created for three purposes: The first, to pay certain annuitants out of the income of the fund; the second, to hold the fund until the time for distribution arrives; and the third, to distribute it to those people who may then be entitled to it, as provided by the terms of the will.

The whole trust, the testator has provided, shall continue as long as is legally possible, and it is not to be confined to any particular subdivision of the trust. The direction to hold and distribute is as imperative as the direction to pay annuitants until distribution is made. When the testator created the trust in the language already quoted he must have intended it should be measured by some lives then in being, and for not more than twenty-one years thereafter, because that is the longest time a trust of that kind is legally possible, and he provided it should last as long as that. There are no other lives that can reasonably be said to have been within the intention of the testator when he was making this provision. It is said that being ignorant of the legal length of time a trust could last, he therefore provided that it should

last as long as legally possible, and thus he could not have had an intention to select any particular life or lives in limiting the length of the trust.

There is force in the argument, but we are disposed to think that the position taken by the trustee is the correct one, and, indeed, is the only one compatible with the intention of the testator, to be gathered from the will. That intention could not have been to create annuities to last forever, as is contended, because it is plain from the provisions of the will that the testator intended to have the gift over of the whole estate created by the will divided at some future time among those who would be entitled to it at the time of such distribution. A perpetual annuity would prevent some part of the gift over from taking effect. There is not only the provision for continuing the trust as long as is legally possible, but there is also a provision, as part of the trust, for holding the fund and distributing it according to the terms of the will. Distribution, therefore, is certainly part of the scheme of the will, and distribution of all of the fund created by the trust—not a part of it. This distribution could not take place if the payment of the annuities provided for in the will were to continue forever.

As he was making provision for the annuitants mentioned in the will and for the payment to the heirs of such of those annuitants as died, it seems plain that the trust for the payment of the annuities should continue no longer than up to the time provided in the will for the distribution of the whole estate, and that distribution we think the testator intended to be twenty-one years after the death of the last survivor of the annuitants named in the will, for that period was as long as the trust could last under the terms of the will.

Upon all these considerations the inference, we think, is very strong that the lives selected were the lives of the annuitants. A reading of the will fails to suggest any other set of lives that the testator could reasonably be supposed to have intended. The inference that he intended these lives is almost conclusive. That he intended to dispose of his whole estate,

and not to die intestate as to any part of it, is plain from the language of the will. Either these lives must be regarded as intended by the testator or there is an intestacy as to a considerable part of the estate. The testator certainly did not mean that, and there is in addition a strong presumption against it. Counsel for the heirs do not argue that testator did not intend to make testamentary disposition of his whole estate, but that the disposition which they contend he did make was invalid. The answer to the question of what disposition he did make is easier to be given when aided by the presumption that he intended a valid rather than invalid disposition, there being from the language of the will one construction of his intention that would make the will valid, although there might be another possible, and at the same time unlikely, construction that would render it invalid. This selection prevents the trust from being bad for uncertainty or remoteness.

The whole of the language of the will must be considered, and while it says the trust is to continue as long as it is legally possible, it must also be remembered that a distribution of the whole estate is to be made, and therefore the continuation of the trust must also be limited by the direction to distribute; or, in other words, the trust is to continue as long as is legally possible and as shall be consistent with making the distribution as directed by the will. This distribution must be made at a time which is not too remote, that is, a time within which the trust would be valid, for the testator provided that the trust should only last that long. Payments of the most of the annuities are to be continued to the heirs of the annuitants, but we think these payments are to stop with the death of the last survivor of the annuitants named in the list and twenty-one years thereafter. The distribution of the entire *corpus* of the fund remaining with the trustee is then to be made as provided for in the will.

The use of the words "under the statute" in the will, providing for the termination of the trust when the law requires

it under the statute, is not material. It must be assumed that the testator was not positive as to the time provided by law for the duration of a trust, or whether it was limited by any particular statute. It is enough to know that his desire was to have the trust continue as long as was legally possible, and consistent with distribution as directed, and that the estate was to be then distributed, and hence the trust to pay the annuities was to cease when it would no longer be consistent with the provision for distribution. As the testator has mentioned annuitants to whom payments are to be made, it is most reasonable to infer from that fact that their lives and the life of the survivor of them were the lives he had in view, and therefore they are to be regarded as selected by him. The fact that in the meantime, when an annuitant died, payment was to be made to his heirs, does not affect the limitation to the survivor of the annuitants. His death then terminates the class, and twenty-one years from that time distribution is to be made.

As the question whether a valid trust has been created depends upon the construction to be given to the language of this particular will, reported cases in regard to the language used in other wills (unless similar to this in their facts) are not of great benefit in the solution of the question as to the intention of the testator in the will before us. The case of *Pownall* v. *Graham*, 33 Beav. 242 (Gray on Rule against Perpetuities, § 219), seems, however, to be as nearly in point as any to be found. There the question was as to what lives were to be taken as measuring the limitation of the trust, as none had been directly selected in so many words by the testator, but it was thought, upon looking over the entire will, that the testator intended a certain class of lives mentioned in it as the limitation of the trust, and the court accordingly so decided. Counsel for the heirs have criticised the application of that case, but we think unsuccessfully.

Some light is also to be found in a certain class of English cases, known as the Heirloom Cases, where bequests of per-

sonal property were made to go as heirlooms along with certain real property, "as far as the rules of law and equity will permit." These cases are to be found in Gray on Rule against Perpetuities, notes to §§ 363–367. They are cited for the purpose of showing that a limitation in a gift, "as far as the rules of law and equity will permit," is not bad for uncertainty, and that the period of limitation to be taken is to be determined from a consideration of the whole will. They strengthen the proposition that it is not necessary to find in the will, in so many words, the selection of lives, but that such selection is good if from a consideration of the whole will that selection can be ascertained.

Counsel for the heirs contend that there is as much reason for including the Kona Orphanage among the lives of the annuitants as a limitation of the trust as there is to say that the limitation includes only the individual annuitants. The orphanage is a corporation or joint stock company, and could not be included in or constitute a life in being within the rule of which we are speaking. To include it would render the trust void, and the testator intended a valid trust.

We see no reason for holding that the number of annuitants, which it is said exceeds forty, is too large for a valid limitation of the trust. There are cases cited from the English reports showing that even a larger number than that has been held not to exceed a valid limitation, and in *Humberston* v. *Humberston*, 1 P. Wms. 332, which is cited in *Thellusson* v. *Woodford*, 11 Ves. 112, 135, it would seem there were about fifty life estates.

We therefore sustain the validity of the trust in this case, and the question remaining is as to the disposition of the surplus income arising during the payment of the annuities. The will shows that the testator supposed there would be such surplus. Should it be accumulated or paid to the heirs of testator? We think the surplus, after paying annuities, must accumulate as part of the trust estate until the time arrives for the distribution of that estate, and that such accumulation

must then be distributed as a part thereof to those who will then have the right to take the estate as provided for in the will. The accumulation is to be treated as a surplus arising from both real and personal estate, and the person or persons entitled to receive the main fund are to take the surplus as if it arose entirely from personalty. Some of the cases upon this subject are gathered in the brief of counsel for the trustee and it is not necessary to cite them here. Holding the trust to be valid, it is not now necessary to determine to whom the distribution is to be made when the time for distribution shall arrive.

The trust company is entitled to take the property and execute the trust. We do not understand that this is now controverted by counsel for any of the parties. In any event, it does not affect the validity of the trust. If the trustee named could not act the court would appoint a trustee to carry out the provisions of the trust. *Vidal* v. *Girard*, 2 How. 127, 191; *Matter of McGraw*, 111 N. Y. 66, 104.

The judgment of the Supreme Court of Hawaii is

Affirmed.